DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1265	*** CAPITAL CASE ***
Title:	Michael Martel, Warden, Petitioner v. Kenneth Clair
Docketed:	April 18, 2011
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(05-99005, 08-75135)
Decision Date:	November 17, 2010
Rehearing Denied:	January 13, 2011
Questions Presented	

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 12 2011	Petition for a writ of certiorari filed. (Response due May 18, 2011)
Apr 12 2011	Appendix of Michael Martel, Warden filed.
May 18 2011	Brief and appendix of respondent Kenneth Clair in opposition filed.
May 18 2011	Motion for leave to proceed in forma pauperis filed by respondent Kenneth Clair.
May 31 2011	DISTRIBUTED for Conference of June 16, 2011.
May 31 2011	Reply of petitioner Michael Martel, Warden filed. (Distributed)
Jun 20 2011	DISTRIBUTED for Conference of June 23, 2011.
Jun 27 2011	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jun 27 2011	Petition GRANTED.
Jul 27 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 9, 2011.
Sep 9 2011	Joint appendix filed. (Statement of costs filed)
Sep 9 2011	Brief of petitioner Michael Martel, Warden filed.
Sep 12 2011	SET FOR ARGUMENT on Tuesday December 6, 2011.
Sep 16 2011	Brief amici curiae of Florida, et al. filed. (Distributed)
Sep 19 2011	CIRCULATED.
Sep 20 2011	The time to file respondent's brief on the merits is extended to and including November 8, 2011.
Sep 21 2011	Record from U.S.D.C. for the Central District of California received from the Chambers of Ninth Circuit Judge Reindhardt. (6 boxes). There are sealed documents in the this record.
Sep 21 2011	Record received from U.S.C.A. for 9th Circuit. (1 box)
Nov 8 2011	Brief of respondent Kenneth Clair filed. (Distributed)
Nov 29 2011	Reply of petitioner Michael Martel, Warden filed. (Distributed)

Dec 6 2011	Argued. For petitioner: Ward A. Campbell, Supervising Deputy Attorney General, Sacramento, Cal. For respondent: Seth P. Waxman, Washington, D. C.
Dec 15 2011	Additional record received from U. S. C. A. for 9th Circuit.
Mar 5 2012	Judgment REVERSED and case REMANDED. Kagan, J., delivered the opinion for a unanimous Court.
Apr 6 2012	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

No.

In the Supreme Court of the United States

MICHAEL MARTEL, *Petitioner*,

v.

KENNETH CLAIR, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
GARY W. SCHONS
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General

BARRY J. T. CARLTON
Supervising Deputy Attorney General
Counsel of Record
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2272
Fax: (619) 645-2271
E-mail: Barry.Carlton@doj.ca.gov

Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

At the end of ten years of capital federal habeas corpus proceedings in the district court, respondent suddenly complained about and sought replacement of his court-appointed public defender with a new appointed lawyer. The district court refused, explaining that "it appears Petitioner's counsel is doing a proper job" and that "[n]o conflict of interest or inadequacy of counsel is shown," and thereupon issued its ruling denying habeas corpus relief. On appeal, however, the Ninth Circuit appointed a replacement lawyer, vacated the judgment, and remanded for further proceedings to allow the new lawyer to raise additional claims for relief. The Ninth Circuit explained that no showing of ineffectiveness of counsel was required, for it was enough that Clair had expressed "dissatisfaction" and had alleged that the public defender was failing to pursue potentially important evidence.

The Question Presented is:

Whether a condemned state prisoner in federal habeas corpus proceedings is entitled to replace his court-appointed counsel with another court-appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence.

LIST OF PARTIES

1. Michael Martel, Warden, California State Prison at San Quentin
2. Kenneth Clair

TABLE OF CONTENTS

Page

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS AND JUDGMENTS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

A. The Crime 3

B. State Trial and Appellate Proceedings 5

C. District Court Habeas Corpus Proceedings 5

D. The Ninth Circuit Proceedings 8

REASONS FOR GRANTING CERTIORARI 10

A. The Ninth Circuit's Interpretation of the Appointment-of-Counsel Statutes Incongruously Gives Habeas Corpus Petitioners a Power to Substitute Court-Appointed Counsel That Even Defendants in Criminal Trials Do Not Possess 11

TABLE OF CONTENTS
(*continued*)

Page

B. By Promoting Substitution of Habeas Corpus Counsel as An Ordinary Matter, the Ninth Circuit Decision Ignores Comity Concerns and Poses a New and Grave Threat to the Finality of State Death-Penalty Judgments 15

C. The Ninth Circuit Decision Improperly Permits Circumvention of AEDPA and FRCP Restrictions on Litigation of New Claims in Successive Proceedings 18

D. The Ninth Circuit Decision Undermines the Fair and Orderly Administration of the Judicial System 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Baze v. *Rees*
553 U.S. 35 (2008) 19
Calderon v. *Thompson*
523 U.S. 538 (1998) 15, 18, 19
Clair v. *California*
506 U.S. 1063 (1993) 5
Crateo, Inc. v. *Intermark, Inc.*
536 F.2d 862 (9th Cir. 1976) 7
Gonzalez v. *Crosby*
545 U.S. 524 (2005) 19, 20
Harrington v. *Richter*
131 S. Ct. 770 (2011) 14, 21, 23
In re Gonzales
623 F.3d 1242,1245 (9th Cir. 2010) 17
Lindh v. *Murphy*
521 U.S. 320 (1997) 12
McFarland v. *Scott*
512 U.S. 849 (1994) 13
Nash v. *Ryan*
581 F.3d 1048 (9th Cir. 2009) 17
People v. *Clair*
2 Cal. 4th 629, 828 P.2d 705 (1992) 5
People v. *Hodges*
174 Cal. App.4th 1096, 94 Cal. Rptr. 3d 862
(2009) 22
People v. *Horton*
11 Cal. 4th 1068, 47 Cal. Rptr. 2d 516, 906
P.2d 478 (1995) 22

TABLE OF AUTHORITIES
(*continued*)

Page

People v. *Roldan*
35 Cal. 4th 546, 35 Cal. 4th 646, 110 P.2d 289 (2005), overruled on other grounds *People* v. *Doolin*, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209, 198 P.3d 11 (2009) 22
Premo v. *Moore*
131 S. Ct. 733 (2011) 22
Rohan ex rel. Gates v. *Woodford*
334 F.3d 803 (9th Cir. 2003) 17
Strickland v. *Washington*
466 U.S. 668 (1984) 12
Terry Williams v. *Taylor*
529 U.S. 362 (2000) 19
U.S. v. *Hicks*
531 F.3d. 49 (1st Cir. 2008) 13
United States v. *Allen*
789 F.2d 90 (1st Cir. 1996) 22
United States v. *Mitchell*
138 F.2d 831 (2nd. Cir. 1943) 13
United States v. *Rodriguez*
612 F.3d 1049 (8th Cir. 2010) 22
Woodford v. *Garceau*
538 U.S. 202 (2003) 19

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

18 U.S.C. § 3006A 3
18 U.S.C. § 3006A(c) 9, 13, 14
18 U.S.C. § 3599 ..... 3, 5, 13
18 U.S.C. § 3599(a) 9
18 U.S.C. §§ 3599(a)(1), (b), (c) 13
18 U.S.C. §§ 3599(b), (c) 13
28 U.S.C. § 1254(1) 3
28 U.S.C. § 2244 ..... 3, 19
28 U.S.C. § 2244(b) 18
28 U.S.C. § 2254 3
28 U.S.C. § 2254(i) 14
28 U.S.C. § 2254(d) 12
Antiterrorism and Effect Death Penalty Act (AEDPA) Pub. L. No. 104-132, 110 Stat. 1214 (1996) ..... 10 *et passim*

CONSTITUTIONAL PROVISIONS

United States Constitution, VI Amendment 9, 13, 17

COURT RULES

Federal Rules of Civil Procedure, Rule 60(b) ..... 2 *et passim*
Rules of the Supreme Court of the United States, Rule 10 23

PETITION FOR WRIT OF CERTIORARI

After ten years of federal habeas corpus litigation involving extensive discovery, an evidentiary hearing, and post-hearing briefing, the parties were awaiting the district court's decision on respondent Kenneth Clair's habeas claims when he abruptly complained about and sought replacement of his court-appointed counsel. The district court refused, explaining that "it appears Petitioner's counsel is doing a proper job" and that "[n]o conflict of interest or inadequacy of counsel is shown." The district court then denied habeas corpus relief. Clair appealed, and after five more years of delay and in the midst of coordinated efforts by Clair's new federal appellate counsel to present additional claims for relief, the Ninth Circuit appointed a replacement lawyer, vacated the judgment, and remanded for further proceedings to allow the new lawyer to raise additional claims for relief. The Ninth Circuit panel (Reinhardt, Pregerson, Wardlaw, JJ.) explained that no showing of ineffectiveness of counsel was required, for it was enough that Clair had expressed "dissatisfaction" and had alleged that the public defender was failing to pursue potentially important evidence. And, although it considered/accepted secret information withheld from the state's lawyers, the panel made no finding that substitution at such a late stage of the district court case somehow had been essential to avoid an unreliable result. Nor, in directing the district court to "rule anew on Clair's habeas petition," did the panel address whether

granting Clair relief conflicted with other habeas corpus statutes and policies.

The panel's decision was erroneous: it constructs a grave new threat to the finality of state capital judgments; it infers from federal appointment-of-counsel statutes an improbable right to substitute counsel in collateral attacks greater than any comparable constitutional right accorded to defendants in criminal trials; it condones "end runs" around restrictions recognized by this Court on FRCP Rule 60(b) motions and prohibitions imposed by Congress on successive federal habeas corpus petitions; and it introduces and encourages a new form of last-minute gamesmanship to derail federal proceedings. Accordingly, Michael Martel, Warden of the California State Prison at San Quentin (the State), seeks a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS AND JUDGMENTS BELOW

The decision of the district court denying habeas relief, its order denying Clair's Rule 60(b) motion, and the memorandum order of the Ninth Circuit vacating and remanding for further proceedings are unreported. Each is reproduced in the Appendix to this Petition (App.).

JURISDICTION

The Ninth Circuit issued its judgment on November 17, 2010, and denied the State's request

for re-hearing and suggestion for hearing en banc on January 13, 2011. This Court has jurisdiction over the State's timely certiorari petition under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the statutes involved in this case—18 U.S.C. §§ 3006A, 3599, and 28 U.S.C. §§ 2244, 2254—are set out in the Appendix.

STATEMENT OF THE CASE

A. The Crime

In early November, 1984, Clair broke into the Santa Ana home of Kai Henriksen and Margaret Hessling. He was arrested and spent the next week in jail.

On November 15, the night of his release from jail, Clair spent part of the evening walking around Santa Ana with his girlfriend Pauline Flores. Leaving her waiting at one point, respondent told Flores that he was going to pick up some things from a nearby abandoned house next door to the Henriksen/Hessling house.

Clair again broke into the Henriksen/Hessling house. Their 25-year-old babysitter, Linda Rodgers, was inside watching their four young children and her own kindergarten-aged daughter. Clair tied Rodgers' hands behind her back, bludgeoned her severely about the head, and strangled her with a shirt tied tightly around her neck. He left her body under an afghan on the bed in the master bedroom,

naked from the waist down and with a vibrator between her spread legs.

Because he had taken too long to return, Flores went looking for Clair, unsuccessfully, in the abandoned house. Flores later encountered him on the street. He told her he had just finished beating up a woman. There was blood on his hand and he was carrying jewelry and other items that, as Flores would later describe them to the police, matched objects that Hessling reported as missing from the house. Flores and Clair bedded down for the night in a churchyard.

Two months after the killing, the police equipped Flores with a tape recorder and arranged for her to meet Clair upon his release from jail on yet another burglary case. During their ensuing conversation, Flores accused Clair of killing Rodgers and told him that the police suspected her. Clair neither expressly admitted nor denied the killing, but told her, "They can't prove a motherfuckin' thing, not unless you open your motherfuckin' mouth." He explained that he had thrown the jewelry away. When she persisted in questioning him, he suggested that Flores was "[m]iked up," and patted her down. He told her, "I hope you don't tell them nothing." After further discussion, he said, "What you fail to realize. Baby what you fail to realize, how the motherfuckers they gonna prove I was there?" "There ain't no motherfuckin' fingerprints, ain't no fuckin' where in there, and ain't no fuckin' body seen me go in there and leave out of there. This is what the fuck I'm saying."

B. State Trial and Appellate Proceedings

In 1987, a California jury convicted Clair of the Rodgers burglary-murder, a capital offense. The court sentenced him to death. Clair appealed and sought state habeas corpus relief. In 1992, the California Supreme Court affirmed the judgment on direct appeal and denied Clair's habeas petition. *People* v. *Clair*, 2 Cal. 4th 629, 828 P.2d 705 (1992). This Court denied certiorari. *Clair* v. *California*, 506 U.S. 1063 (1993).

C. District Court Habeas Corpus Proceedings

Clair filed a federal habeas corpus petition in 1994. Under 18 U.S.C. § 3599, the district court appointed the Federal Public Defender (FPD) as Clair's federal habeas counsel. The district court then stayed the federal proceedings to give Clair a chance to return to the California Supreme Court to "exhaust" his state remedies on some newly raised claims. Clair filed a second state habeas corpus petition in the California Supreme Court in 1995. The California Supreme Court denied that petition too.

Clair then returned to federal court in October 1995, almost ten years after the murder. Nine more years later, and after extensive discovery, the district court in 2004 held a two-day evidentiary hearing. Clair's counsel called seven witnesses: a social historian, an expert in male sexual abuse victims, an

eyewitness identification expert, Clair's trial investigator, Clair's trial lawyer, the psychologist hired by Clair's trial lawyer, and a trial juror.

In 2005—six months after the evidentiary hearing, after the parties had submitted written post-hearing arguments, and just before the district court judge's anticipated retirement and issuance of its ruling on Clair's habeas petition—Clair for the first time complained to the court that he was dissatisfied with his FPD attorneys. He sent the court a letter, dated March 16, complaining that his FPD counsel's briefing was "sloppy"; that they had not tried hard enough to locate a drinking buddy who supposedly could provide Clair with an alibi; and that in general they were not sufficiently contesting his guilt. (3-16-05 Letter at 1-3.) Upon the court's invitation, the FPD responded in writing on April 26 that, as of April 20, Clair had indicated that he wanted them to continue as counsel but that he also wanted to re-evaluate the situation "at the conclusion of the proceeding in this Court." (4-26-05 Letter at 1-2.) Three days later, the court issued a minute order indicating that, in light of the FPD's letter, it saw no need to take further action.

In a subsequent letter to the court dated June 16, 2005, however, Clair alleged that a private investigator had found, in the Santa Ana police files on the Rodgers murder case, evidence of fingerprints that did not match anyone known to have been at the murder scene. Clair complained that the FPD had failed to ask for DNA testing. (6-16-05 Letter.) He

asserted that he now wanted to be represented by a lawyer from the Stanford Law School. (*Id.*)

On June 30, the court declined to substitute counsel. It explained: "It appears that Petitioner's counsel is doing a proper job. No conflict of interest or inadequacy of counsel is shown." (6-30-05 Minutes.) On the same day, the court issued an order denying all of Clair's habeas claims. (App. 21.) Judgment was entered on June 30, 2005.

Clair appealed. The FPD informed the Ninth Circuit that it no longer could work with him. (10-21-05 Letter.) Construing the letter as a motion to be relieved, the Ninth Circuit granted it and directed the FPD to find replacement counsel. (11-4-05 Order at 1.) On January 12, 2006, the Ninth Circuit issued an order indicating John Grele was counsel of record for Clair on appeal. (1-12-06 Order.)

With Grele now representing him, and with the appeal pending, Clair filed a FRCP Rule 60(b) motion in the district court, seeking to re-open the judgment. He claimed that he had recently discovered certain new physical evidence and that the State had committed fraud by withholding other evidence—evidence he disclosed to the court in secret but that he and the court withheld from the state's lawyers. Following Ninth Circuit procedure, *see Crateo, Inc.* v. *Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976), the district court (with a new judge replacing the retired judge) announced that it was not "disposed" to rule on the motion. (App. 14.) But the Ninth Circuit then instructed the district court to do so. The district court then denied the motion, explaining that

Clair's cited evidence, still kept secret from the State's lawyers, would not have made any difference in the outcome of his petition. (App. 9, 16-19.)

In 2008—with the appeal still pending—Clair filed a third habeas corpus petition in the California Supreme Court[1] and lodged a duplicate of it in the Ninth Circuit coupled with a request for permission to file it as a successive federal petition. In these petitions, Clair for the first time alleged that he was actually innocent of the murder.

D. The Ninth Circuit Proceedings

The Ninth Circuit requested briefing on what relief was available to Clair (1) on his appeal, (2) on his Rule 60(b) appeal, and (3) in his application for leave to file a successive petition—and on what relief was available on all the permutations of (1), (2), and (3). (6-12-09 Order.) Then—twenty-three years after Clair's conviction, sixteen years after the initiation of federal proceedings, and five years after the district court had denied his federal petition in its entirety—a Ninth Circuit panel (Reinhardt, Pregerson, and Wardlaw, JJ.) in November 2010 issued an unpublished memorandum vacating the district court judgment.

In the panel's view, the district court had abused its discretion in denying without further inquiry Clair's second eve-of-judgment request to substitute new counsel in place of the FPD.

---

[1] Clair's third state habeas petition is currently pending before the California Supreme Court in Case Number S169188.

According to the panel, 18 U.S.C. § 3006A(c) (providing for appointment of counsel for indigents) and 18 U.S.C. § 3599(a) (affording capital petitioners counsel in habeas corpus proceedings) together entitled petitioner to "meaningful assistance" of habeas counsel and therefore imposed a duty on the district judge to exercise discretion to determine whether the "interests of justice" required the requested substitution.

The panel acknowledged that there is no Sixth Amendment right to effective assistance of counsel on habeas, and expressly noted that it had made no finding of ineffective assistance by Clair's appointed counsel in the federal habeas proceedings. Nor did the panel find—even though it also accepted/considered secret evidence submitted by Clair and withheld from the State—that the FPD's performance had prejudiced Clair, rendered the judgment unreliable, or even affected the result. (App. 5.) Instead, the panel concluded, the district court had erred by failing to exercise informed discretion in light of the fact that Clair was unhappy with the FPD and had alleged that the FPD had failed to present "important" evidence. (App. 4-5.)

The panel effectuated Clair's request for substitution by appointing Grele to represent Clair in the district court. Then it remanded the case for further proceedings—including, explicitly, for consideration of attempts by Clair to amend his federal petition to raise additional claims.

The State sought re-hearing and hearing en banc. In it the State noted that, without any finding

that FPD had been ineffective, Clair was awarded a new round of habeas litigation while keeping the "important physical evidence" that FPD purportedly should have discovered secret from the State. The State argued the Ninth Circuit erred in considering evidence on appeal that was withheld from the State in the district court, improperly expanding the right to counsel of a habeas petitioner contrary to Congress's intent, and granting Clair relief would constitute an impermissible end run on the limitations in the Antiterrorism and Effect Death Penalty Act of 1996 (AEDPA) on successive petitions. These matters had been briefed in the appeal but were never addressed in the analysis offered in the panel's opinion. The Ninth Circuit denied re-hearing.

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit erroneously inferred from federal appointment-of-counsel statutes an improbable right to substitute counsel in collateral attacks greater than any comparable constitutional right accorded to defendants in criminal trials. In doing so, it presented capital habeas corpus petitioners—whose main incentive is delay—with a roadmap describing a new avenue for frustrating the State's compelling interest in the finality of its capital judgments. Equally warranting this Court's intervention, the Ninth Circuit decision condones "end runs" around restrictions recognized by this Court on Rule 60(b) motions and around prohibitions imposed by Congress on successive federal habeas corpus petitions.

Moreover, the Ninth Circuit's decision introduces, and inevitably encourages, a new form of last-minute gamesmanship to derail ongoing federal proceedings and render earlier proceedings obsolete. And it ill-uses habeas corpus to set in motion a new but still dreary parade of successive attacks on lawyers who agree to take on the onerous and unpopular job of representing defendants convicted of the worst kind of murders. That the Ninth Circuit decision followed on its receipt of secret information withheld from the State's lawyers—an unjustified departure from "the usual course" of adversarial proceedings—only underscores the need for review by certiorari.

A. The Ninth Circuit's Interpretation of the Appointment-of-Counsel Statutes Incongruously Gives Habeas Corpus Petitioners a Power to Substitute Court-Appointed Counsel That Even Defendants in Criminal Trials Do Not Possess

By finding error in the district judge's refusal to substitute counsel, the Ninth Circuit interpreted federal appointment-of-counsel statutes in a way that improbably gives petitioners collaterally attacking final state-court judgments a power to demand a series of publicly-funded lawyers that not even defendants in criminal cases possess under the Constitution. Before Clair could have obtained similar relief in a criminal trial, he would have been

required to show both deficient performance by counsel and resulting prejudice. *See Strickland* v. *Washington*, 466 U.S. 668, 688, 694 (1984). If substitution is ever required in civil and collateral habeas corpus proceedings, then the necessary showing must be more compelling than what suffices in a criminal trial.

Here, however, the Ninth Circuit found reversible error and re-opened the district court proceedings with new substituted counsel even though Clair had expressed no dissatisfaction with the FPD over the course of ten years, had even withdrawn an eleventh-hour request for new counsel, and in the end had merely second-guessed the way the active and fully-engaged FPD had handled certain aspects of the federal litigation. Neither the district judge nor the Ninth Circuit found or purported to find, for example, that Clair's statutory right to counsel had been so impaired as to make substitution necessary to avoid a fundamentally unreliable result in the federal proceedings. Given the limited and collateral nature of federal habeas corpus review—typically occurring only after a full criminal trial, appeal, and collateral post-judgment review in state court, and tightly circumscribed by deferential protection of the state-court judgment under 28 U.S.C. § 2254(d)—the condemned prisoner should not be permitted to so easily exploit his statutory right to appointed counsel in a way that serves his perverse interest in delaying the state's right to enforce its death judgments. *See Lindh* v. *Murphy*, 521 U.S. 320, 340 (1997) (incentive of

capital defendants is "to utilize every means possible to delay carrying out their sentence").

Certainly, the pertinent appointment-of-counsel statutes do not support the Ninth Circuit's incongruous reading of them. Section 3599 of Title 18 of the United States Code provides for appointment of counsel for indigent capital defendants, and establishes that such counsel must meet certain qualifications and may be replaced only by similarly-qualified counsel. 18 U.S.C. §§ 3599(a)(1), (b), (c); *see McFarland* v. *Scott*, 512 U.S. 849, 855 (1994). Section 3006A(c) of Title 18 establishes that counsel appointed at the court's discretion in non-capital cases may be terminated if the petitioner becomes financially able to pay for representation; that, if a petitioner becomes unable to pay for retained counsel, retained counsel may be appointed "as the interests of justice may dictate"; and that the court may substitute counsel at any stage "in the interests of justice."

Neither statute reflects any Congressional intent to provide capital habeas petitioners with the full panoply of Sixth Amendment rights to counsel, much less greater rights. *See, e.g., U.S.* v. *Hicks*, 531 F.3d. 49, 54-55 (1st Cir. 2008) (criminal defendant entitled to new counsel if can demonstrate breakdown of such degree as to prevent an adequate defense); *United States* v. *Mitchell*, 138 F.2d 831 (2nd. Cir. 1943) (delay by last minute discharge of counsel requires exceptional circumstances). Congress certainly intended for capital habeas petitioners to have qualified lawyers (18 U.S.C.

§§ 3599(b) and (c)), and for courts in non-capital cases at least to have a certain amount of freedom to replace counsel "in the interests of justice." Indeed, the § 3006A(c) "interests of justice" standard, even if it governs capital cases, may operate more as restriction on discretion to replace counsel than as a mandate for the petitioner to force substitution—especially not substitution of a qualified lawyer engaged in active representation of him in the proceedings. Nothing suggests that Congress intended to give habeas petitioners such control over their litigation that they may force substitution if counsel declines to do their bidding.

The notion that Congress might have meant to hand such a prerogative to the delay-incentivized habeas corpus petitioner is even more remarkable in that Congress made plain in AEDPA its overarching intent to minimize the scope of federal habeas review of state court decisions as much as possible without entirely eliminating it. *See Harrington* v. *Richter*, 131 S. Ct. 770, 786-787 (2011). On the contrary, the Ninth Circuit decision appears to directly conflict with Congress's AEDPA amendment in 28 U.S.C. § 2254(i). That provision lays down the rule that, "[t]he ineffectiveness or incompetence of counsel during State or *Federal* collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." (Emphasis added.) Here, despite § 2254(i), the Ninth Circuit granted Clair relief in the form of vacating the judgment against him in this federal collateral

proceeding—and did so upon what it acknowledged to be a showing lesser than one of ineffectiveness.

B. By Promoting Substitution of Habeas Corpus Counsel as An Ordinary Matter, the Ninth Circuit Decision Ignores Comity Concerns and Poses a New and Grave Threat to the Finality of State Death-Penalty Judgments

It is not surprising, in light of the incongruity of inferring from the cited statutes a broader right to substitute counsel in habeas corpus cases than in criminal cases, that the Ninth Circuit's view of what the statutory right to habeas counsel demands is untenable for many other reasons too. Of prime importance, the Ninth Circuit's concoction poses a grave new threat to the State's compelling interest in finality. *See Calderon* v. *Thompson*, 523 U.S. 538, 555-556 (1998).

Although the Ninth Circuit decision here is interlocutory in nature, the disruption it threatens is inevitable and immediately palpable. Given the timing of Clair's substitution demand at the eleventh hour, when judgment was imminent and little if anything more would need to be done at that late stage by Clair or the State, the Ninth Circuit's disruptive decision would serve no practical purpose or effect unless interpreted as a mandate for new counsel to pursue additional claims in the remand proceedings. Indeed, the district court in Clair's Rule 60(b) motion ultimately ruled, prior to the Ninth

Circuit's decision here, that the evidence presented by Clair's new Ninth Circuit appointed counsel would have made no difference: the claims in Clair's 1995 petition would have been denied anyway. The efforts of substitute counsel on multiple fronts in seeking to raise additional claims in conjunction with the appeal confirm that additional claims will be the centerpiece of the remand proceedings. The Ninth Circuit ruling is all about litigation of newly raised claims for relief—23 years after his conviction and 19 years after the finality of his state court appeal.

Thus, Clair now will return to re-opened proceedings in the district court to "determine what actions and submissions to the district court, if any, would be appropriate before the district court rules anew on Clair's habeas petition, and then proceed accordingly." (App. 6.) The district court must "consider any such submissions, including any requests from counsel to amend the petition to add claims based on or related to the alleged new physical evidence, as if they had been made prior to the ruling on the writ." (App. 6.) The new lawyer brought into the district court proceedings by the Ninth Circuit itself, on account of Clair's complaints about his original lawyers, undoubtedly will file "upon proper consultation with Clair" (*see* App. 5-6) in accordance with these already-in-the-works plans to raise additional claims and to negate decisions made by the prior lawyers. After nearly 17 years of federal habeas litigation, the State will then have to start defending its judgment anew before the district court rules on Clair's habeas petition "anew."

Prolonged further delay is the inevitable result of exalting the habeas corpus petitioner's interest in counsel above and beyond even that of the presumed-innocent criminal defendant's. Further proof of that, if not already obvious, may be seen in how the Ninth Circuit's over-broad view of the habeas petitioner's statutory right to appointed counsel also has wrought open-ended delay in capital cases involving alleged "incompetence" of the petitioner to proceed with his own lawsuit. In two parallel cases to this one—*Rohan ex rel. Gates* v. *Woodford*, 334 F.3d 803, 813 (9th Cir. 2003), and *Nash* v. *Ryan*, 581 F.3d 1048, 1051-1055 (9th Cir. 2009)—the Ninth Circuit held that a habeas petitioner's right to an appointed attorney also implies the right to be able to rationally communicate with the attorney. Accordingly, under these Ninth Circuit decisions, district court habeas proceedings—and even the appeal following denial of habeas relief—must be suspended if the petitioner is not capable of assisting counsel in the same way the Sixth Amendment requires defendants to be able to assist counsel at trial. The Ninth Circuit's decision on the scope of the petitioner's interest in counsel in this case, and in cases following *Rohan* and *Nash*—*see, e.g.*, *In re Gonzales*, 623 F.3d 1242,1245 (9th Cir. 2010) (cert. pet. pending in Case No. 10-930—present a clear and present danger of unjustified impairment of the State's compelling interest in finality).

In any event, the five-year delay following the district court judgment, now extended by the Ninth Circuit's order for new proceedings on remand, already constitutes an intolerable interference with

the Sate's interest in finality in this case—whatever the course of the new proceedings. Not only have the federal proceedings consumed 17 years, but the district court in the Rule 60(b) proceedings already had ruled that none of the new evidence presented by Clair and his newly-appointed substitute counsel would have made any difference: his petition would have been denied anyway.

The Ninth Circuit formulation of the "interests of justice" takes no account whatsoever of the compelling finality interest of the States. The damage it has done, and the damage it inevitably will do in this and other cases, warrants intervention by this Court.

C. The Ninth Circuit Decision Improperly Permits Circumvention of AEDPA and FRCP Restrictions on Litigation of New Claims in Successive Proceedings

Also of prime importance, the Ninth Circuit decision creates a means for circumventing the successive-petition prohibition imposed by Congress in 28 U.S.C. § 2244(b) and additional restrictions recognized by this Court as limiting the reach of FRCP Rule 60(b) motions. The power of a federal court to substitute habeas counsel, whatever its source, must be circumscribed in all events by AEDPA especially. *See Calderon* v. *Thompson*, 523 U.S. at 554.

Although Clair filed his habeas petition prior to enactment of AEDPA, the limitations of 28 U.S.C. § 2244 as amended by AEDPA nonetheless apply to any successive habeas corpus petition he now seeks to file. *Thompson*, 523 U.S. at 554. Further, even when the terms of AEDPA do not specifically govern a first habeas proceeding, a federal court must nevertheless "exercise its discretion in a manner consistent with the objects of the statute" and "must be guided by the general principles underlying our habeas jurisprudence." *Id.* And Congress's overriding AEDPA intent was "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) ; accord, *Terry Williams* v. *Taylor*, 529 U.S. 362, 386 (2000) ("Congress wished to curb delays, to prevent `retrials' on federal habeas, and to give effect to state convictions to the extent possible under law"); *Baze* v. *Rees*, 553 U.S. 35, 69 (2008) (Alito, J., concurring) (Congress wished to put an end to the "seemingly endless proceedings that have characterized capital litigation").

Similarly, Clair's Rule 60(b) motion was also subject to the limitations of AEDPA. "Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that new claim must be dismissed unless it relied on either a new rule of constitutional law or newly discovered facts." *Gonzalez* v. *Crosby*, 545 U.S. 524, 531 (2005). Further, a Rule 60(b) motion that attacks habeas

countervailing restrictions of AEDPA or the policies underlying these limitations in deciding to allow Clair to reopen his first federal habeas proceeding and requiring the district court to decide the case anew after considering submissions from Clair, including requests from Clair to amend his petition. Nothing in the Ninth Circuit's order suggests that it gave due consideration to the State's significant interest in the finality of its judgment, or evidence of any regard for the "sound and established principles that inform" proper consideration of habeas petitions. *Harrington* v. *Richter*, 131 S. Ct. at 780, 787. As such, the Ninth Circuit's order represents an untenable end run around the requirements of AEDPA.

D. The Ninth Circuit Decision Undermines the Fair and Orderly Administration of the Judicial System

Even beyond its deleterious impact on finality, and on AEDPA and FRCP policies, the Ninth Circuit decision damages federal habeas proceedings in other respects.

The decision below, first, would institutionalize yet another round of seemingly endless criticism of each lawyer who undertakes to assist in the inmate's defense. As this Court very recently explained, however, "intrusive post-trial inquiry" into defense counsel's performance "threaten[s] the integrity of the very adversary process the right to counsel is meant to serve." *Harrington* v. *Richter*, 131 S. Ct. at

788. Further, challenges to counsel's performance, if lacking the necessary foundation, "may bring instability to the very process the inquiry seeks to protect." *Premo* v. *Moore*, 131 S. Ct. 733, 741 (2011).

That instability arose here, of course. Further, by promulgating a far too easy path to incentivized replacement of counsel, the Ninth Circuit decision likely will disserve mutual confidence between the inmate and his lawyer. State courts wrestling with substitution-of-counsel requests have found that out. See, e.g., *People* v. *Roldan*, 35 Cal. 4th 646, 674-675, 35 Cal. 4th 646, 110 P.2d 289 (2005), overruled on other grounds *People* v. *Doolin*, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209, 198 P.3d 11 (2009); *People* v. *Horton*, 11 Cal. 4th 1068, 1104, 1110-1112, 47 Cal. Rptr. 2d 516, 906 P.2d 478 (1995) (noting remarkable similarity with another case wherein the defendant was able to delay his trial for months based on substitution motions); *People* v. *Hodges*, 174 Cal. App.4th 1096, 1110-1111, 94 Cal. Rptr. 3d 862 (2009) (noting "gamesmanship" in substitution-of-counsel motions). Federal courts, too, are aware of the gamesmanship problem. *See, e.g., United States* v. *Rodriguez*, 612 F.3d 1049, 1054 (8th Cir. 2010) ("[T]he need to thwart abusive delay tactics ..."); *United States* v. *Allen*, 789 F.2d 90, 92 (1st Cir. 1996) ("This restraint [on the right to replace counsel] is to ensure that the right is not manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.")

Further, the Ninth Circuit's ruling here proceeded from, and thus necessarily will encourage

in the future, a "judicial disregard" of the "adversary process" in federal habeas corpus proceedings. *See Harrington* v. *Richter*, 131 S. Ct. at 780. For here, the Ninth Circuit—and the district judge—accepted secret argument and evidence from Clair that was withheld from the State's lawyers and thus withheld from adversarial testing. Such unjustified and unexplained secrecy was, most fundamentally, unfair to the State in its efforts to vindicate its compelling interest in finality. It also ill-behooves the federal court to engage in such an apparently one-sided approach without any demonstration or explanation of its necessity. If such unfair secrecy "so far depart[ing] from the usual course of judicial proceedings" truly were essential to administering this contemplated new industry of successive representation of habeas petitioners by new publicly-funded lawyers in successive re-opened proceedings, it would serve only as yet another reason to grant certiorari and nip the Ninth Circuit's substitution-of-counsel procedure in the bud. S.Ct. Rule 10.

California spent a decade defending a presumptively-correct judgment, arising in the most serious of criminal cases, in collateral federal litigation in the district court, and then five more years in the Ninth Circuit litigating Clair's appeals. The Ninth Circuit's dangerous and disruptive over-expansion of the prisoner's statutory right to appointed counsel now requires the State to return to the district court in order for the district court to entertain Clair's additional submissions and requests to amend his petition to add additional claims. This,

now, nearly two decades after the State's judgment of conviction and sentence of death were final, and almost 30 years after Clair brutally murdered Linda Rodgers. The Ninth Circuit's interpretation of the statutory right to counsel fundamentally disregards the principles that must inform the exercise of federal habeas jurisdiction, improperly diminishes and misallocates finite judicial resources, unfairly impairs the State's compelling interest in finality, and undermines respect for the criminal justice system. This Court should intervene and correct it.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: April 12, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
GARY W. SCHONS
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
BARRY J. T. CARLTON
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner

BJTC:sm
SD2011700987
70459293.doc

APPENDIX

No.

In the Supreme Court of the United States

MICHAEL MARTEL, *Petitioner,*

v.

KENNETH CLAIR, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
GARY W. SCHONS
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General

BARRY J. T. CARLTON
Supervising Deputy Attorney General
Counsel of Record
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2272
Fax: (619) 645-2271
Barry.Carlton@doj.ca.gov
Counsel for Petitioner

INDEX

Page

Ninth Circuit Memorandum
Vacating Appeal and Remanding
Case to District Court
Clair v. Ayers
Case Nos. 05-99005, 08-75135
Filed November 17, 2010 1

Ninth Circuit Order
Directing Supplemental Briefing
on Appeal
Clair v. Ayers
Case No. 05-99005
Filed June 12, 2009 7

District Court Order
Denying Motion to Vacate Judgment
Under Federal Rule of Civil Procedure 60(b)
Clair v. Ayers
Case No. CV 93-1133 CAS
Filed May 21, 2007 8

Ninth Circuit Order
Granting Limited Remand for
Determination on Rule 60(b) Motion
Clair v. Ayers
Case No. 05-99005
Filed April 9, 2007 12

District Court Order
Denying Application to
Entertain Rule 60(b) Motion
Clair v. Ayers
Case No. CV 93-1133 CAS
Entered September 22, 2006 14

INDEX
(continued)

Page

District Court Judgment
Denying Habeas Corpus Petition
Clair v. Brown
Case No. CV 93-1133 GLT
Filed June 30, 2005 20

District Court Order
Denying Petition for Writ of
Habeas Corpus and Issuing
Certificate of Appealability
Clair v. Brown
Case No. CV 93-1133 GLT
Filed June 30, 2005 21

18 U.S.C. § 3006A (excerpts) 92

18 U.S.C. § 3599 (excerpts) 94

28 U.S.C. § 2244 97

28 U.S.C. § 2254 100

FILED November 17, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH CLAIR,
Petitioner-Appellant,
v.
ROBERT L. AYERS, of California State Prison at San Quentin,
Respondent-Appellee.
Nos. 05-99005
D.C. No. CV-93-1133-GLT

MEMORANDUM*

KENNETH CLAIR,
Petitioner-Appellant,
v.
ROBERT L. AYERS, of California State Prison at San Quentin,
Respondent-Appellee.
Nos. 08-75135
D.C. No. 2:93-cv-1133-CAS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding
Christina A. Synder, District Judge, Presiding

Argued and Submitted February 18, 2010
Pasadena, California

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: PREGERSON, REINHARDT and WARDLAW, Circuit Judges.

Petitioner Kenneth Clair appeals the district court's denial of his petition for habeas corpus. In addition to other claims, he contends that the district court abused its discretion by denying without investigation his June 2005 request that the court replace his appointed counsel with new counsel.

As a federal habeas petitioner in a capital case, Clair has a statutory right to counsel. *See* 18 U.S.C. § 3599(a)(2). "Congress' provision of a right to counsel under [18 U.S.C. § 3599] reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of the seriousness of the possible penalty and ... the unique and complex nature of the litigation." *McFarland v. Scott*, 512 U.S. 849, 855 (1994) (internal quotations and citation omitted). This "right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *Id.* at 858.

Section 3599 provides that counsel may be changed upon a defendant's motion, but does not provide a standard under which such a motion should be adjudicated. *See* 18 U.S.C. § 3599(e). There is, however, a statutory standard for when courts may change counsel for *noncapital* habeas defendants, who are not entitled to counsel but may be appointed counsel at the discretion of the court: a "court may, *in the interests of justice*, substitute one appointed counsel for another at any stage of the

proceedings." 18 U.S.C. §3006A (a)(2)(B) (emphasis added). Given the importance that it placed on "quality legal representation" for capital habeas defendants, Congress must have intended to provide such petitioners with at least as much opportunity to replace counsel with whom they are dissatisfied as it provides noncapital habeas petitioners who have no statutory entitlement to counsel. Accordingly, when faced with Clair's request for new counsel, the district court was required at a minimum to ascertain whether the interests of justice required that the request be granted.

The district court did not explain its decision, but it is clear from the record that it either failed to apply the correct "interests of justice" standard or did so in an implausible, illogical or unreasonable manner. Accordingly, it abused its discretion. *See United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). On June 16, 2005, Clair wrote a letter to the court, requesting that new counsel be appointed. The court was aware that Clair was having problems with his counsel: only three months earlier it had received from him a letter alleging a longstanding pattern of inattention to his case. In response to that letter, the district court made inquiry of Clair's counsel, who notified the court in April 2005 that they had spoken with Clair and that he was willing to have them continue to represent him for the time being. The June 16th letter repeated allegations made in the previous letter, but also included a serious additional allegation: that a private investigator working on Clair's behalf had located important physical evidence from the crime scene that had never been tested, and that his counsel, despite having been informed of the evidence, had made no effort to obtain it, analyze it or present it to the court. Clair's

private investigator sent the court a letter substantiating Clair's claims. The court received and opened the private investigator's letter, but returned it without filing it, citing Local Rule 83-2.11.

The physical evidence that Clair claimed had been located was potentially of great importance to Clair's habeas petition. His conviction was based upon circumstantial evidence, and occurred before the advent of DNA testing and other modern forensic techniques. Faced with Clair's second letter requesting new counsel and the serious allegations therein, the court was required to ascertain, at the least, whether the interests of justice required substitution of counsel.

"[M]eaningful assistance of counsel is essential to the fair administration of the death penalty." *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 813 (9th Cir. 2003). Counsel who do not act within a reasonable time on material information relating to their clients' petition are not providing meaningful assistance. Having received Clair's allegations, which implicated the fairness of the proceeding, the district court could not have plausibly made a determination whether changing counsel was in the interest of justice without making some inquiry into Clair's allegations. Certainly Clair's earlier expression of discontent might have alerted the court to the possibility that Clair was not getting the benefits of meaningful assistance of counsel. Following receipt of Clair's June 16th letter, however, the district court made no inquiry into the truth of Clair's allegations or their potential impact on the case before it. Instead, the district judge without explanation denied the motion on the same day that he denied Clair's petition, and then retired the following day. The court's failure to inquire as to Clair's allegations was an unreasonable application

of the law to the facts in front of it, and an abuse of discretion.

The state misperceives Clair's claim, framing its response as if he were asserting a claim for ineffective assistance of counsel. As the state accurately points out, habeas petitioners claiming ineffective assistance of counsel face steep hurdles. *See District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308, 2320 (2009); *Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993). Clair's contention, however, was not that his habeas counsel was constitutionally ineffective, but rather that the district court failed properly to exercise its discretion with respect to his request for his statutory right with regard to a change of counsel. As with other matters concerning the district court's exercise of its discretion, we must reverse the district court on a showing that it abused that discretion. Here, by failing to exercise its discretion at all, it abused it.

Accordingly, we vacate the district court's denial of Clair's request for new counsel, as well as the subsequent denial of his petition for writ of habeas corpus. The district court's failure to exercise its discretion foreclosed the possibility that different counsel, upon proper consultation with Clair, would have taken additional necessary action with respect to prosecuting Clair's habeas petition, including the appropriate steps — such as seeking an evidentiary hearing or seeking a stay to pursue proper relief in state court — to ensure that the allegedly newly discovered physical evidence was given due consideration and, if appropriate, incorporated into Clair's habeas petition.[FN1]

> FN1. We note that the counsel appointed to represent Clair on appeal raised related issues in a Rule 60(b) motion to the district court, which the district court denied

> without a hearing. Rule 60(b) provides a very limited opportunity to redress defects in a district court decision and 60(b) motions are adjudicated under a different standard than that under which a request by Clair to modify his petition prior to that petition's denial would have been adjudicated.

Because Clair has been appointed new counsel on appeal,[FN2] and because the district judge has retired, the most reasonable solution to the conundrum of how to correct on remand the district court's abuse of discretion is to treat Clair's current counsel as if he were the counsel who might have been appointed had the district court properly exercised its discretion in response to Clair's request for new counsel. *See Fetterly v. Paskett*, 997 F.2d 1295, 1301-02 (9th Cir. 1993). In that role, counsel shall consult with Clair and determine what actions and submissions to the district court, if any, would be appropriate before the district court rules anew on Clair's habeas petition, and then proceed accordingly. The district court shall, in turn, consider any such submissions, including any requests from counsel to amend the petition to add claims based on or related to the alleged new physical evidence, as if they had been made prior to the ruling on the writ that we have vacated and shall make all further determinations that may be required in accordance with applicable law.

> FN2. John R. Grele was appointed counsel of record on January 10, 2006, and that appointment shall continue through all further proceedings absent a motion from counsel or Clair. See 18 U.S.C. § 3599(e).

VACATED and REMANDED

FILED June 12, 2009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH CLAIR,
Petitioner-Appellant,
v.
ROBERT L. AYERS, JR.,
Respondent-Appellee.

No. 05-99005
D.C. No. 2:93-cv-1133-CAS
Central District of California

ORDER

The Court grants a COA as to each of the uncertified issues raised in Appellant's opening brief. *See* AOB at 79-126; *see also* 9th Cir. R. 22-1(e),(f). Appellee shall file a supplemental answering brief, not to exceed 14,000 words, addressing those issues by July 14, 2009. Appellant's supplemental reply brief, not to exceed 14,000 words, is due August 14, 2009. In the supplemental briefs, each party also shall succinctly address: (A) What relief is sought and available in (i) the 28 U.S.C. § 2254 appeal in 05-99005, (ii) the Rule 60(b) appeal in 05-99005, and (c) 08-75135?; and (B) To what extent would relief sought in any of these sub-categories, if granted, obviate relief sought under either of the other sub-categories?

BY AND AT THE DIRECTION OF THE COURT:
Pinky Argonza
Deputy Clerk

FILED May 21, 2007

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR,
Petitioner,
v.
ROBERT AYERS, Warden of California State Prison at San Quentin,
Respondent.

CASE NO. CV 93-1133 CAS
DEATH PENALTY CASE

ORDER DENYING MOTION TO VACATE JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)

On June 30, 2006, Petitioner applied to this Court for permission to file a motion under Fed. R. Civ. P. 60(b) for relief from the judgment entered on June 30, 2005, denying his petition for Habeas Corpus. Along with his Application, Petitioner lodged his proposed Motion to Vacate Judgment, which was stamped "filed" by the office of the Court Clerk. In considering the Application, the Court reviewed and considered the merits of the proposed Motion to Vacate Judgment. Concluding that relief was not likely on the Motion, the Court denied the Application by Order dated September 21, 2006.

The next activity in this proceeding was in the Ninth Circuit, with Petitioner's October 23, 2006 Motion to Remand, which was granted by an Order dated April 9, 2007. The panel remanded the matter to this Court with two instructions. First, this Court was directed to rule on "Petitioner's yet-to-be-filed

Rule 60(b) motion." Second, the Court was directed to "address Respondent's argument that documents which Petitioner filed under seal (which were apparently also filed ex parte) must be unsealed (or at least served upon Respondent) so that Respondent may address the merits of Petitioner's Rule 60(b) motion."

As an initial matter, the Court notes that the panel required that Petitioner file his motion within 30 days of April 9, 2007. Petitioner was unable to file by that date, and requested an extension on May 15, 2007. The Court notes the uncertainty, raised by Petitioner, as to whether a Motion to Vacate Judgment was actually filed on June 30, 2006. In addition, any delay in filing was both harmless and entirely a matter of form and not substance. Petitioner has stated in his May 15, 2007 Request to Set Hearing Date for Motion to Vacate Judgment Pursuant to Rule 60(b) that he will be resting upon the arguments already presented to the Court, and that he does not wish to replace or supplement the moving papers lodged with the Court on June 30, 2006. For those reasons, the Court **GRANTS** Petitioner's Request to Extend Time to File, and deems Petitioner's motion papers timely filed.

The Court has reviewed the Rule 60(b) Motion, dated June 30, 2006, and the accompanying Memorandum of Points and Authorities, and exhibits submitted therewith, including the exhibits submitted with the Motion to Reopen as well as the papers and pleadings on file in this matter. The Court finds that its concerns, as expressed in the September 21, 2006 Order, have not been addressed. Accordingly, the Court sees no reason to alter its conclusions regarding reopening this case. Again, the Petitioner fails to provide the Court with any argument as to how any particular result from

testing or further investigation will advance any specific claim in a way that was not done, or was not possible, in prior proceedings. At most, the Court views the Motion as a request to retry some claims with a new focus, and the need for finality in judgments strongly militates against granting the request. Accordingly, the Court hereby **DENIES** the Motion to Vacate the Judgment, on the grounds set forth in its prior Order denying the Application.

Having denied relief on the motion, the Court finds the question of whether Petitioner must provide Respondent with the withheld materials it filed in support of his Application and the Motion moot. For that reason, and because the Court does not wish to put Petitioner in the position of having unknowingly or unwillingly waived part of his attorney-client privilege, it does not order those materials to be provided to Respondent. Should Petitioner wish to appeal this decision, or, as noted by the panel, choose to renew the motion in the Court of Appeals, he may then decide whether he wishes to put his attorney-client communications at issue and deal with the consequences at that time.

Petitioner has filed a number of other motions with this Court in anticipation of further proceedings at this level. This Court having complied with the mandate of the Ninth Circuit and ruled upon the proffered Motion, no further proceedings are necessary. Accordingly, the Motion for Discovery, the Joint Stipulation Regarding Discovery, the Request to Set a Hearing Date, and the Application for Expert Services are all **DENIED**.

There remaining no matters at issue, the Court views this matter as closed. Pursuant to the direction by the Court of Appeals, this Court **GRANTS** a Certificate of Appealability as to the

issues raised by Petitioner's Motion to Vacate Judgment.

IT IS SO ORDERED.

Dated: May 21, 2007

/s/ Christina A. Snyder

The Honorable Christina A. Snyder

United States District Judge

FILED April 9, 2007

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH CLAIR,
Petitioner-Appellant,
v.
ROBERT L. AYERS, JR., Warden,
Respondent-Appellee.

No. 05-99005
D.C. No. CV-93-1133-GLT
C.D. Cal.

ORDER

Before: O'SCANNLAIN, GRABER, and BEA, Circuit Judges

The district court denied Petitioner's request that it entertain his Rde 60(b) motion.[FN1] However, because we conclude that Petitioner should be able to appeal the district court's decision on the merits of Petitioner's Rule 60(b) motion, we grant a limited remand for a determination of Petitioner's yet-to-be filed Rule 60(b) motion.[FN2]

FN1. See *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004) (to seek Rule 60(b) relief during the pendency of an appeal, the proper procedure is to ask the district court whether it wishes to entertain the motion or to grant it, and then move the court of appeals if appropriate for remand of the case).

FN2. See *Canadian Ingersoll-Rand Co. v. Peterson Products of San Mateo, Inc.*, 350 F.2d 18, 27 n.16 (9th Cir. 1965) (where a

district court has denied a motion for an order indicating that it will "entertain" a Rule 60(b) motion, appellant may renew the motion in the court of appeals).

Petitioner shall file his Rule 60(b) motion in the district court within 30 days of the date of this order, unless that time is extended by the district court. We express no opinion on the merits of Petitioner's Rule 60(b) motion. The district court shall also address Respondent's argument that documents which Petitioner filed under seal (which apparently were also filed ex parte) must be unsealed (or at least served upon Respondent) so that Respondent may address the merits of Petitioner's Rule 60(b) motion.

Appellate proceedings in this case number are stayed pending further order of this Court.

ENTERED September 22, 2006

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR,
Petitioner,
v.
ROBERT AYERS, Warden of California State Prison at San Quentin,
Respondent.

CASE NO. CV 93-1133 CAS
DEATH PENALTY CASE

ORDER DENYING APPLICATION TO ENTERTAIN MOTION

Petitioner has applied to the Court for an order wherein the Court may consider a motion under Rule 60(b) to vacate the judgment in this case entered against him by this Court on June 30, 2005. The Court **DENIES** the request.

The grounds on which Petitioner requests that the Court entertain the motion are that it presents two meritorious claims for relief. Petitioner has filed a copy of the motion he will present in the event the Court determines it appropriate to reopen the case. "To seek Rule 60(b) relief during the pendency of an appeal, the proper procedure is to ask the district court whether it wishes to entertain the motion, or to grant it, then move this court, if appropriate for remand of the case," Williams v. Woodford, 384 F.3d 567, 586 (9th Cir. 2004). The Ninth Circuit indicated on July 18, 2006, that it will suspend briefing on the appeal before it if this Court decides to entertain the motion. The matter is properly presented.

The factual and procedural background of the case has been set out in this Court's Order of June 30, 2005.

Petitioner seeks to have this Court consider withdrawing judgment in this case to rule on two newly-presented claims for relief.[FN1] The first involves the discovery of the physical evidence in the case, previously reported as having been discarded or destroyed, in the late stages of the habeas action. The second concerns this Court's handling of frictions between Petitioner and the Deputy Federal Public Defender assigned to handle his habeas case. Neither presents sufficient reason to persuade the Court to consider reopening the matter.

> FN1. Because the Court declines to reopen the case, it does not decide whether the claims Petitioner wishes to press would constitute a "second or successive petition" under the Anti-Terrorism and Effective Death Penalty Act of 1986.

The arguments concerning the physical evidence fail to specify the claims they would buttress or introduce, and no clear statement is made to explain their possible significance. Instead, Petitioner argues that the physical evidence would provide "affirmative evidence." This, he says, combined with "the testimony of three eyewitnesses[FN2] who saw someone other than Mr. Clair" murder the victim, would be "sufficient to raise reasonable doubt." Further, he argues that trial counsel's representation could be held deficient for failing to take some unspecified actions regarding the physical evidence, and that a claim could be created that the state committed misconduct at trial by withholding some other evidence, "such as additional fingerprints or reports," which has yet to be found but might be uncovered through

examination of the physical evidence. These arguments are unpersuasive.

> FN2. Petitioner does not explain this reference, but the Court presumes that he is referring to the child witnesses whose potential testimony was part of the evidentiary hearing in this case ordered on February 28, 2003. -Petitioner did not present any live testimony from these witnesses at the hearing, and, as a result, the Court found in its Order of June 30, 2005, that the testimony of the children, the eldest of whom was six years old at the time of the murder, was inconsistent and not credible. See Order of June 30, 2005, pp. 34-35.

Although Petitioner states that the late discovery of the evidence might constitute mistake under 60(b)(1) or "new" evidence under 60(b)(2) to justify relief from the final order, it is neither a counsel's error nor evidence new to the case. Petitioner must proceed under the 'catch-all' in 60(b)(6) for other reasons justifying relief. To gain relief, Petitioner must show that the evidence can be used to change the factual or legal status of a claim so substantially that the Court would choose to withdraw the judgment and reopen proceedings.

There are three apparent claims discernable in Petitioner's argument. First, he argues that the scientific analysis of this evidence, in combination with all that which he has previously presented, would suffice to prove him actually innocent. Leaving aside the issue of the very high bar set for claims of actual innocence in habeas proceedings, Schlup v. Delo, 513 U.S. 298 (1995), this argument fails because the evidence is not argued, and does not appear, to have any particular importance.

Petitioner was not convicted through use of physical evidence, but through circumstantial evidence and by his own words as recorded by Pauline Flores. Petitioner himself argued at trial about the lack of any physical evidence placing him at the scene of the crime, and brought out the fact the that testing of the cigarette butts found on the bed at the murder scene, which is mentioned in his brief here, ruled out Petitioner as a source of the salivia thereon. The state did not argue that Petitioner was not linked to the crime by physical evidence only because the scientific testing available was inadequate. There is no argument presented that further testing of the physical evidence might exculpate Petitioner, and there is no other suspect[FN3] proposed that such testing might inculpate. There is no mystery that testing of the evidence might solve, see Cooper v. Woodford, 358 F.3d 1117 (9th Cir. 2004), and, in fact, no support is given for the claim that testing of physical evidence will yield greater results now than it did at time of trial, other than declarations by counsel and its investigator. Petitioner has failed to provide a persuasive reason why further testing of the physical evidence is necessary.

> FN3. Petitioner has argued that Kai Henriksen, in whose bed the victim was found, may have committed the killing. However, finding his saliva on cigarette butts in his bedroom or his fingerprints in that room would not be significant.

Petitioner also appears to make two additional claims regarding the physical evidence. First, he argues that testing of the evidence may produce some result that would enable him to argue that trial counsel was inadequate because he failed to order such tests. Second, he posits that testing of the

evidence may lead to the discovery of further material, "such as additional fingerprints or reports," which had been wrongfully withheld by the state at trial. These arguments are entirely speculative and conjectural, and do not justify reopening the case.

Petitioner's other line of argument concerns the Court's resolution of his complaints about his representation in the habeas proceeding. Petitioner independently retained C.J. Ford ("Ford") to investigate the case during habeas proceedings. Ford worked in parallel and sometimes at cross purposes to the Deputy Federal Public Defender ("DFPD") assigned. Petitioner portrays him as hampered by lack of co-operation from the DFPD but as ultimately much more productive. Ford's perceived success increased the friction between Petitioner and the DFPD.

The Court received pro se complaints from Petitioner regarding his appointed counsel. In March 2005, responding to a complaint letter, the Court instructed Petitioner and counsel to meet, after which Petitioner agreed on April 28, 2005, to continue with his representation by the DFPD.

Briefing in the case closed on January 31, 2005. Petitioner filed a notice of additional authority on May 5, 2005, and submitted additional declarations to the Court on June 3, 2005. On June 20, 2005, Petitioner again complained of difficulties with counsel. Contrary to Petitioner's representations, the Court did not reject the letter without comment. A further Order of the Court on June 30, 2005, found that no justification for a change of counsel had been provided, and included the letter as an attachment. The final Order in this case issued on June 30, 2005. Petitioner does not allege that his consent to continued representation by the DFPD on April 28, 2005, was coerced or fraudulently obtained.

Accordingly, he claims inadequate assistance of counsel at a time when all proceedings in the case were under submission. On that basis, Petitioner claims that he has suffered "gross negligence" requiring relief from judgement.[FN4]

FN4. Petitioner admits that there is no constitutional right to adequate assistance of counsel in habeas proceedings, Murray v. Giarratano, 492 U.S. 1 (1989).

In essence, relief is sought for the denial of the June 20 request for new counsel. Given that all proceedings had closed, the only basis for granting the request would be the discovery of new evidence requiring reopening the case for further proceedings. As discussed above, no such new evidence exists, and it is not persuasive to argue that one needs new counsel with which to await issuance of the court's final order. Even allowing Petitioner's creative reconstruction of his argument to avoid the prohibition of claims for inadequate assistance of habeas counsel, the Court is unconvinced that it acted incorrectly or that Petitioner suffered any prejudice as a result.

The Court is unpersuaded that the proposed motion is meritorious and accordingly declines the invitation consider a motion to set aside the judgment in this case. The application to entertain a Rule 60(b) motion is therefore **DENIED**.

IT IS SO ORDERED.

Dated: September 19, 2006

/s/ Christina A. Snyder

CHRISTINA A. SNYDER

United States District Judge

FILED June 30, 2005

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR,
Petitioner,
v.
JILL BROWN, Warden of California State Prison at San Quentin,
Respondent.

CASE NO. CV 93-1133 GLT
DEATH PENALTY CASE

JUDGEMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Petitioner Kenneth Clair's petition for writ of habeas corpus be **DENIED**.

Dated: June 30, 2005
/s/ Gary. L. Taylor
The Honorable Gary L. Taylor
United States District Judge

FILED June 30, 2005

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR,
Petitioner,
v.
JILL BROWN, Warden of California State Prison at San Quentin,
Respondent.

CASE NO. CV 93-1133 GLT
DEATH PENALTY CASE

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND ISSUING CERTIFICATE OF APPEALABILITY

The Court has received and considered the briefing of the parties concerning the remaining issues in the First Amended Petition for Writ of Habeas Corpus, ("FAP") including those on which an Evidentiary Hearing was held. For the reasons set forth herein, the Court DENIES the Petition for Writ of Habeas Corpus. On its own initiative, the Court has evaluated the claims within the Petition for suitability for the issuance of a Certificate of Appealability, and issues a Certificate as set forth below.

I. Procedural History

This case started by the filing of a Request for a Stay of Execution on February 26, 1993. The execution date was repeatedly continued and then finally stayed on September 15, 1994, with the filing of the initial Petition for Writ of Habeas Corpus. Respondent moved to dismiss that Petition on

verification grounds on September 29, 1994, but the motion was denied on December 14, 1994. Thereafter the parties returned to the California state court system for further exhaustion proceedings until the Court was notified of a ruling by the state Supreme Court by a filing dated July 19, 1995. The First Amended Petition for Writ of Habeas Corpus was filed on October 16, 1995.

Motions practice on the Amended Petition began. Respondent moved to dismiss claims in the Amended Petition on November 27, 1995. Following extensive briefing, including the filing of sur-reply briefs by Petitioner and supplemental memoranda by Respondent, the Court granted the motions as to one claim on February 29, 1996. Petitioner then moved to restore the claim on April 25, 1996, following notification to the Court of a further ruling of the state Supreme Court by a filing on April 23, 1996. That was granted by the Court's Order of August 22, 1997, which also dismissed Claims 12 and 27 of the Amended Petition pursuant to pending motions by Respondent.

During the pendency of those motions, the Respondent filed an answer to the Amended Petition on February 7, 1996. Following decision on those motions, an Amended Answer was filed on January 13, 1998. Petitioner filed a Traverse to the Answer on July 2, 1998.

Petitioner moved for an Evidentiary Hearing on December 16, 1998, and for discovery on June 17, 1999. Discovery was granted, in part, by Order dated February 16, 2000. That order also extended briefing on the Motion for Evidentiary Hearing, allowing completion of discovery before the filings of new briefs. The discovery cut-off was extended multiple times. A motion to compel discovery was filed on August 24, 2001, and denied on August 31, 2001.

The rebriefmg of the Motion for Evidentiary Hearing began on August 31, 2001, with the Opposition being filed on March 13, 2002, and the Reply filed on July 25, 2002. An evidentiary hearing was granted on five issues by Order of February 28, 2003, with a hearing date of July 8, 2003.

A Joint Request for Discovery was filed on April 23, 2003, which was granted on May 7, 2003. A corresponding request for a protective order relating to attorney-client communications was filed on May 15, 2003, and granted on June 11, 2003. The Order was settled with input from the parties on July 2, 2003.

Following extensions of time, the Evidentiary Hearing was begun on August 20, 2004, and completed on August 24, 2004. Thereafter final briefing was begun on October 25, 2004, and substantially completed on January 31, 2005, with a final brief received on May 5, 2005. This Order follows.

II. The Facts of the Case

Kenneth Clair was convicted and sentenced to death for having murdered Linda Rodgers ("Rodgers") in the course of a burglary. The facts recounted here come from the California Supreme Court's opinion in this case, *People v. Clair*, 2 Cal.4th 629 (1992), and from the papers filed by the parties.

Rodgers and her daughter Kristy lived in a house at 1721 West Wilshire Avenue in Santa Ana rented by Margaret Hessling ("Hessling") and her boyfriend, Kai Henriksen ("Henriksen"), along with Hessling's four children. Rodgers would babysit Hessling's children. On or about November 7, 1984, that house was burglarized by Petitioner, who had been squatting in an empty house next door. Information linking Petitioner to the burglary was provided to the police by Kai Hemicksen; Petitioner

was aware of that fact. Petitioner was arrested for the burglary on November 11th and jailed until his release in the early evening on November 15th.

On that night, Hessling and Henriksen were absent from the house. Rodgers was in the house, along with the five children. At some point in the night, Rodgers was beaten, stabbed, and strangled. Her body was found in the master bedroom, with her hands bound behind her back, naked from the waist down, with her legs open and a sexual device between her thighs.

Petitioner was at that time a homeless transient. Law enforcement officers focused their suspicions on him because of the previous burglary and the timing of his release from jail. Although forensic evidence was collected from the house, no physical evidence (blood, fingerprints, hair, fingernail scrapings, or body swabs) was found to show Petitioner had been in the house on the night Rodgers was murdered.

Petitioner's conviction was obtained primarily from the assistance of Petitioner's then-girlfriend, Pauline Flores Cody ("Flores"). Flores testified she met Petitioner when he was released from jail on the burglary charge and the two walked in the neighborhood. Flores testified that, when they were near the house where Petitioner was staying, Petitioner asked her to wait by a tree and said he would be right back. She waited about an hour and then left, encountering Petitioner five or ten minutes later.

Flores reported that Petitioner was carrying some jewelry and other items and had blood on the palm of his right hand. She testified that Petitioner told her he had just fmished "beating up a woman." Hessling later reported that those items had been stolen from the house on the night Rodgers was

murdered. Petitioner also had beer of a brand he did not usually drink. When questioned by Flores, he said he had bought it from a liquor store on a certain street corner. There was no such stare at that location. Hessling testified at trial that beer of that brand was taken from the house on the night of the murder.

Flores began cooperating with police, and two months after the Rodgers murder, in January 1985, Flores was fitted with a concealed recording device and met with Petitioner following his release from jail after his arrest on an unrelated burglary charge. In the course of their conversation, she and Petitioner discussed the events that occurred on the night Rodgers was murdered. Petitioner made a number of statements that were capable of being regarded as admissions of involvement in the murder. Petitioner disputes that interpretation.

In August 1985, the Orange County District Attorney charged Petitioner with the murder of Rodgers and the related burglary. Petitioner was also charged with the earlier burglary of the same residence. The prosecution further alleged two death-qualifying special circumstances: that the murder of Rodgers occurred during the course of a burglary and that it occurred during a rape.

Jury selection began on June 22, 1987, and concluded on July 14, 1987. After the guilt phase trial, Petitioner was convicted of both burglaries, the murder of Rodgers, and the jury found "true" the special circumstance that the murder occurred in the course of a burglary. The jury rejected the special circumstance alleging that the homicide occurred in the course of an attempted rape. The "true" finding as to the burglary-murder special circumstance, however, was sufficient to make Petitioner eligible for the death penalty.

After a penalty trial, the jury returned a verdict of death. The prosecutor's evidence at the penalty phase principally consisted of two prior crimes. First, the prosecutor introduced evidence relating to Petitioner's 1976 conviction for the armed robbery of Colleen Daspit and Dorothy Carboni in Louisiana, when he was approximately 17 years old, to which Petitioner had pled guilty and received a prison sentence in the Louisiana State Penitentiary at Angola. Second, the prosecutor introduced evidence that Petitioner unlawfully entered the residence of siblings Milton and Murline Owens at a time when they were not home. Petitioner was to be charged with burglary for that offense, but the charges were later dropped. Petitioner was found by the police in Murline's bed, with indications the apartment had been ransacked, and a butcher knife in the adjacent bathroom.

Petitioner's mitigation presentation focused on lingering doubt and on generating sympathy for him because of his background and character. His mother, Celina Clair Gladden, testified his Uncle Jack disciplined Petitioner throughout his childhood and youth, often using harsh physical methods. Petitioner became withdrawn in his early teens when his mother married Bubba Gladden, an ex-convict who had served a term in the Louisiana State Prison at Angola, whom Petitioner did not like. Petitioner's achievement at school declined, and he received psychological counseling for a few months.

A few days after his Uncle Jack struck Petitioner's mother with a car following a dispute between Petitioner and Jack, Petitioner committed the Daspit armed robbery, and despite having no previous trouble with the law, he was sent to the Louisiana State Prison at Angola. Petitioner has

reported awful conditions at that prison as part of his Federal habeas petition.

He was released in 1982, and returned to live with his mother for a brief time before moving to California at the urging of his grandmother and his father, John Anderson. He shared living quarters with family members and others for a few years before ending up homeless. A number of people testified to his good character in those years. Petitioner did not take the stand at any time during the trial.

III. The Claims of the First Amended Petition

This case was filed in 1994, before the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996. The claims shall be analyzed under the standards prevailing before the Act, *Woodford v. Garceau*, 538 U.S. 202, 210 (2003). The Court shall review the State courts' resolutions of legal issues without deference or the application of a presumption of correctness, Townsend v. Sain,

372 U.S. 293, 318 (1963).

A. Claim I- Exclusion of Black Jurors

Petitioner alleges he was denied his right to an impartial jury because the prosecution used peremptory challenges to strike two of three otherwise-qualified black jurors, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). The fact that a black person served on the jury does not disprove the claim, nor does the fact that two black potential jurors were struck prove that a violation occurred. Under Batson, once petitioner has established that members of a cognizable racial group were struck, he must show facts and circumstances raising an inference that peremptories were executed on a racial basis. Petitioner has not made such a showing.

The claim is based on the argument that the two excluded black jurors were questioned differently from the white jurors. He claims that only the black jurors were asked about harboring racial bias and that the answers the dismissed black jurors gave were "just like" those given by others who sat on the jury. These claims are not supported by the trial transcript.

First, it is true that it was only the black jurors— including Jackson, who sat on the jury— were asked by the prosecutor whether they could fairly judge a black man who killed a white woman, Rosalind Smith RT 572-573, Jackson 711-712, and Reese RT 287-288. But, white jurors were also questioned by the prosecution about their racial views. Panel member Eric Christensen had an extended and seemingly spirited discussion with the prosecutor about racial issues, Reporter's Transcript ("RT") at 508 et seq., and prior to that Kathleen Bavaro removed herself from the jury pool by telling the Court that her racial issues would prevent her from rendering a fair verdict in the case, RT 502-503. Racial issues and attitudes of all jurors were examined. It may be true that some blacks were asked different specific questions, but the Court does not find that the tone or thrust of the juror examination was different for different races.

In addition, the questioning of the jury cannot be examined in a vacuum. In context, race was present early in the jury selection process because of the attitudes of the jury. In the initial death-qualification stage, black juror Horace Reese passed through questioning by the Court and defense counsel before informing the prosecutor that it would be "quite difficult," RT 290, for him to be fair to the state's side when judging a black defendant. Reese is a fourth "otherwise qualified" black juror, who passed

a challenge for cause on death qualification but removed himself during the second voir dire because it was too "distasteful" to serve, R.T 1384. Questioning on racial attitudes in death qualification began with defense counsel's questioning of Mr. Reese, RT 287, was abandoned for a substantial time until raised by Bavaro and Christensen, and occurred periodically thereafter on final voir dire; Stewart RT 1278, Miller RT 1281, Bozarth RT 1325 and others. Because previous jurors found their racial attitudes disabling, it would be unrealistic to disallow such questioning.

Doris Humphrey, one of the peremptorily challenged black jurors, was not asked about racial attitudes[FN1] in the death-qualification process, RT 215-229, or in second voir dire, RT 1236-1250. Members of all races were asked about their racial attitudes, and, while it might be insulting or repugnant to be asked if one would favor someone of the same race in a criminal trial, insult is not a constitutional violation where the character of the questioning is generally the same across all racial types.

> FN1. Petitioner states in his First Amended Petition that Humphrey, like Jackson, was singled out for racial questioning. The part of the transcript he cites for this proposition is the questioning of Rosalind Smith.

Petitioner's claim that Smith and Humphrey were treated differently from white jurors is of two parts. First, he argues that Humphrey was dismissed after only "perfunctionary" questioning, citing two related questions put to her on secondary voir dire as the whole of her examination. This argument omits mention of the fact she was examined for almost 13 pages of transcript at the

death- eligibility stage. Humphrey was not peremptorily challenged without being meaningfully questioned. Second, Petitioner argues that the answers of black jurors were "just like those" of white jurors who sat. To do that, he argues that answers like "I think so," "probably so," and "I think I could" are always qualitatively inferior to unqualified answers such as "yes." That proposition requires reaching too much into a cold transcript, and overlooks the substance and context of the answers. Petitioner urges a white juror who answered "I think I could do it" when asked whether she could vote for the death penalty presents the same profile as Smith, who reached that formulation, RT 572, after being painstakingly led there after saying "I just can't say I believe in the death penalty because I don't." RT 569. That statement would not qualify as cause, but properly supports use of a peremptory challenge. Likewise, Humphrey stated "I don't know, I might" automatically vote against the death penalty without regard to the evidence, and "maybe" would vote against guilt just to avoid the penalty phase, RT 216-217. Humphrey was sufficiently rehabilitated to preclude a challenge for cause, but those answers support the later challenge. Petitioner has not provided examples of similar statements and lines of discussion by white jurors who were not challenged. The circumstances of the strikes do not give rise to a presumption of bias, Wade v. Terhune, 202 F.3d 1190, 1198 (9th Cir. 2000).

There is no extrinsic evidence of a policy to exclude blacks from this jury, unlike that found in Miller-El v. Dretke, ___ U.S. ___, 2005 WL 1383365 (June 13, 2005), and, there being clear support from the record for the use of peremptory challenges, this claim must be denied.

B. Claim II- Unrepresentative Jury

Petitioner claims he was denied a fair, trial because his jury was not drawn from a fair cross section of the community. Petitioner claims that Hispanics were systematically excluded from the jury pools in Orange county, and that he was thereby denied his right to a jury drawn from a cross-section of his community. Jury selection in Orange County was one-step, with no prequalification questionnaire. The resulting jury pools were argued in another legal action, People v. Ramos, 15 Cal.4th 1133 (1997), to have underrepresentation.s of Hispanics too large to be explained by chance. Petitioner's reliance on the factual development and precedent of the Ramos case is unhelpful to him. This Court, like the Ramos court and others, Sanders v. Woodford, 373 F.3d 1054, 1068-1070 (9th Cir 2004) (1982 trial), does not find a constitutionally significant disparity, 15 Cal.4th at 1156, and finds no violation of Petitioner's constitutional rights. This claim is denied.

C. Claim 3- Misconduct of Juror Joseph Jackson

Petitioner claims juror Joseph Jackson lied on his juror questionnaire, rendering his subsequent voir dire ineffective, and thereby deprived Petitioner of his rights to a fair trial and an impartial jury, among others. This claim was aired at the Evidentiary Hearing in this Court. Mr. Jackson appeared and testified regarding his statements. In brief, Petitioner complains that Jackson did not mention three nephews who had been in trouble with the law; one, Melvin Turner, currently resides on Death Row. The questionnaire asked whether "any close friend or relative" had involvement as a victim, defendant, or witness. Petitioner argues that Jackson lied by not answering 'yes' to that question, and that that action signals bias against Petitioner. The Court does not agree.

Having seen him testify, the Court finds Jackson credible when he testified that he did not consider the three Turner nephews to be 'close' relatives. He did not spend time with their mother, his sister Elcina. As the first of ten children, Elcina grew up and moved out of state before Jackson, the seventh child, was born. Jackson grew up in Texas, the Turners were in California, and they would meet for only a few days each year. When Jackson later moved to California he avoided contact with his sister and her children because he knew that they were trouble. The Court finds credible his explanation that he did not consider or forgot about the Turner nephews when he answered the jury questionnaire.

Petitioner does not show any evidence undercutting that explanation. He argues that bias should be presumed because the relationship between Jackson and the Turner nephews was "such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances," Tinsley v. Borg, 895 F.2d 520, 527 (9th Cir. 1990). There is no explanation by Petitioner of the relevant circumstances here, other than the fact of a blood relation. Petitioner cites no relationship with the nephews. Instead, Petitioner cites elements of factual misstatements by Jackson at the evidentiary hearing in an attempt to cast Jackson's sincerity into doubt. In part, Petitioner overinflates some of Jackson's statements, arguing that Jackson's statement that the Turner nephews had been in "trouble" with the law contradicts his denials of knowledge about particular acts performed and jail times served by them. Another statement by Jackson that he did not think about Melvin Turner while serving as a juror is disputed by Petitioner, who cites declarations by three other serving jurors who stated that Jackson mentioned a relative who

was in trouble with the law, possibly in jail in California for manslaughter. If correct, these statements show, at least, that Jackson has now forgotten a comment he made approximately seventeen years ago. Petitioner argues Jackson shared that story with other jurors as a way of expiating his "shame and anger" (Petitioner's Opening Brief, pg. 11) over his nephews' criminal histories, and closed his mind to Petitioner's innocence in order to accomplish some undefined goal connected to his undetermined relationship with the Turner nephews. Such a speculative conclusion is logically unwarranted. Petitioner has not shown that Jackson has made any misstatements about his relationship with the Turners, and has not shown that it was anything other than a distant relationship in a large family. The claim must be denied.

D. Claim IV- Death-Qualification Questions Were Too Confusing

Petitioner claims he was deprived of a fair trial and an unbiased jury because a substantial portion of the jury pool, perhaps in excess of one quarter, found the standard questions posed by the trial court at the death qualification stage to be confusing or "tricicy." There is no citation of authority for the proposition that such a factual situation has or could result hi habeas relief. Most likely it cannot, especially where, as here, both sets of counsel were free to follow up and question jurors who expressed confusion or who seemed uncertain at the death-qualification stage or the later voir dire. In addition, the Court notes from the Reporter's Transcript that the trial judge would revise and extend his questioning when it appeared that a jury member was having difficulty. At worst, a juror who was inflexibly committed to imposing the death penalty would give inaccurate, but

unintentional, moderate answers. The further questioning that took place for each prospective juror would have exposed such views. The relief requested on this claim must be denied.

E. Claim V- The July was Biased in Favor of the Death Penalty

Several of the jurors and alternates who served at trial made statements during death qualification or on their juror questionnaires ranging from expressing support for the death penalty to lamenting that it was not applied with sufficient frequency. This Petitioner argues, shows that his jury was predisposed to convict him and punish him with death. Again, Petitioner makes the argument without the support of authority showing that this sort of claim has been found meritorious anywhere. To the extent that Petitioner is arguing that the process of death qualification results in a jury partial to punishment, the rejection of that claim is settled law, *Harris v. Pulley*, 885 F.2d 1354, 1371 (9th Cir. 1989). Each of the jurors complained of here were questioned about their views and each gave proper answers respecting the law and promising to faithfully and impartially judge this case. Petitioner has not argued that any pro-death penalty statement by a juror was left unexplained and that a later challenge for cause by defense counsel was denied. Petitioner has not alleged that any such challenge for cause should have been made. The claim must be denied as it lacks foundation in either the facts or the law.

F. Claim VI- Jurors were Improperly Dismissed for Cause

Petitioner argues he has been denied his right to a fair trial and an impartial jury because twelve jurors were dismissed for cause without fully ascertaining their views of the death penalty.

Review of their questioning discloses that each had expressed opposition to the death penalty or unwillingness to impose it even if merited under the law. Of these, jurors Munoz, Lepper, Kerr, and Gattas appear to the Court to have been somewhat equivocal in their opposition or unwillingness.[FN2] Munoz' examination covers over ten transcript pages and concludes with an attempted, and failed, rehabilitation by the Court. Lepper's examination extends 17 transcript pages and she was twice reexamined by defense counsel in an effort to save her. Kerr, whose questioning covers twelve pages, was also reexamined by defense counsel, but moved to a position where she informed the trial judge directly that she could not bring herself to vote for the death penalty, RT 875. Gattas began his questioning by stating that he had never thought much about the death penalty, then, through an awakening process that included a number of times where he failed to make audible responses to questions, finally concluded that he could not vote to impose the death penalty. Here, as well, defense counsel intervened to attempt to rescue Gattas for the panel, but failed.

> FN2. Petitioner states that Michael Ryan was equivocal. That is not so. He consistently expressed opposition to the death penalty, saying "There's just no way I would vote for the death penalty," RT 346, and telling defense counsel that it would be impossible for him to impose the death penalty. Likewise, Petitioner cites panel members Martinez, McDaniel, and McKay as uncertain, but the transcript shows them to be otherwise. McKay's questionnaire was apparently so vehement that the Court only asked him twice to affirm what he had

written there before he was challenged for cause, RT 740.

It is incorrect to say, as Petitioner does, that these prospective jurors were dismissed without adequately ascertaining their degree of opposition to the death penalty. Neither trial counsel nor the Court can be faulted for choosing not to spend more time attempting to flesh out the views of the four panel members cited by Petitioner, as their positions were clear. For the others, who were arguably on the fence given the substance of their remarks in the transcript, effort was made to get them to accept their roles as jurors under the law. This could not be done. The facts as shown from the transcript of proceedings do not support Petitioner's claim that jurors were dismissed without ascertaining their views on the death penalty. The claim must be denied.

G. Claim VII- Inadequate Assistance of Counsel During Jury Selection

Petitioner claims he was denied his right to adequate assistance of counsel in his trial by derelictions by counsel during jury selection. In part, Petitioner argues that the wrongs he suffered in claims I-VI were caused by counsel's failure to adequately represent him. As the Court has determined that those claims are without merit, the Court summarily denies the claim to the extent that it presents that argument. There was no reason for counsel to preserve an objection to the exclusion of prospective jurors Humphrey and Smith, as there was evident reason in the record to support the use of a peremptory challenge against them.

Jurors who expressed support for the death penalty, Petitioner argues, should have been challenged more strongly by counsel to expose the fact that they harbored a bias that should have

prevented them from serving on the jury. He argues that his counsel was deficient in not challenging them strongly enough and in not using peremptory challenges to remove them from the jury. In large part this claim urges the Court to second-guess counsel's trial strategy in his questioning and use of challenges. Absent any presentation of evidence by Petitioner tending to throw counsel's decisions, particularly on the use of peremptories, into doubt, the Court declines to do so. The complaint that counsel should have "done more" to expose or bar jurors overly comfortable with the death penalty is unquantifiable hindsight.

First, each juror passed questioning by the Court, in which they had to agree to apply the law according to the facts and acknowledge that there could be no automatic bias in favor of the death penalty. No juror favoring the death penalty answered the judge's questions incorrectly— favoring automatic imposition of the death penalty, or refusing to impose the death penalty even if it was merited. In part, Petitioner criticizes his counsel for failing to do what the prosecutor did in exposing inability to apply the law in death penalty cases. However, the comparison is inapt: principled refusal to apply the death penalty in any case is a viewpoint that is honored by many. An unshakeable desire to execute all wrongdoers regardless of facts or circumstances is not a point of view widely held or honored. It is not reasonable to fault defense counsel for failing to get panel members to confess such a viewpoint, especially after they have correctly responded to the trial judge's inquiries on that point.

Petitioner also complains that his counsel failed to exhaust all of his peremptory challenges,[FN3] and offers his opinion as to which jurors should have faced peremptory challenges by the defense. No

citation is given to support the contention that the failure to excuse jurors without cause may be the foundation for a claim of deficient performance. Petitioner suggests persons who have some appeal as subjects of a challenge, but the Court is disinclined to agree. Not having seen the jurors speak, the Court lacks the ability possessed by trial counsel to evaluate potential jurors and infer their attitudes and viewpoints. It could be concluded that strongly pro-law enforcement or pro-death penalty jurors would be particularly offended by a case shown to be weak or circumstantial. Almost any viewpoint is sufficient to justify decisions made regarding peremptory challenges. Petitioner, with access to the record, counsel, and investigatory services, has introduced nothing showing peremptory challenges were misused or neglected. The fact that some challenges were left unused is meaningless in itself, and Petitioner's view that some jurors should have been struck is simply dissent.

FN3. Petitioner states that counsel used 24 of his 26 challenges, First Amended Petition at 89, line 4, while Respondent states that counsel used 19 of 26, Amended Answer at 56, lns. 21-22.

Analysis under Strickland v. Washington, 466 U.S. 668 (1984), to evaluate deficient performance is unnecessary where there has not been a colorable showing of deficiency, and deference to counsel's professional judgment is appropriate where there has been no showing that such deference is unwarranted. The Court declines to grant relief on this claim.

H. Claim VIII- Cumulative Error in Jury Selection and Voir Dire

Cumulative error analysis applies where a number of minor errors, not individually resulting in prejudice, combine to infect proceedings with

unfairness to the defendant, United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir.1996). Where, as here, no such errors have been identified, such analysis is unwarranted, United States v. Martinez-Martinez, 369 F.3d 1076, 1090 (9th Cir. 2004). Likewise, the fact that unhurried review of in-court actions, such as the use of peremptory challenges, discloses choices that might have been better for Petitioner does not make cumulative error analysis appropriate. Relief requested under this claim must be denied.

I. Claim IX- Brady Violation

Prosecutors must disclose all substantial material evidence to the defense, Brady v. Maryland, 373 U.S. 83 (1963). Failure to disclose evidence violates due process when it results in the denial of a fair trial, Kyles v. Whitley, 514 U.S. 419, 433 (1995). There are three requisites for a Brady claim. 1) the evidence was withheld by the prosecution; 2) the evidence is exculpatory or useful for impeachment; and 3) the evidence is material, Moore v. Illinois, 408 U.S. 786, 794-795 (1972). The evidence must be "material" such that its withholding creates a reasonable probability of undermined confidence in the outcome, United States v. Agurs, 427 U.S. 97, 109-110 (1976). Petitioner argues a number of Brady violations by the prosecution.

First, he states that Hessling received favorable treatment in a felony welfare case pending against her in exchange for her testimony against Petitioner. The pending case was known to defense counsel, and he argued to the trial court that the docket sheet for her felony prosecution noted that her case was being held because she had "special information," but the trial court refused to let him introduce the docket sheet to impeach Hessling. In response to the prosecutor's objection that it was hearsay, the trial

court ruled it inadmissible. Defense counsel had, however, asked Hessling in front of the jury whether she was receiving special treatment in her case because of her testimony there. She denied that she was. Petitioner reports that her court records indicate a favorable notation in her felony docket record after her testimony against Petitioner. Later, after failing to comply with conditions that would have reduced the matter to a misdemeanor, Hessling pled guilty to the felony charges.

Hessling's testimony was used to link Petitioner to the crime. She reported ownership of certain items that Flores testified Petitioner showed her or gave to her on the night of the crime and afterwards. Respondent argues that her testimony was not particularly significant, and was secondary to that given by Flores. Further, she argues, there is no proof that any secret deal existed, and Hessling's "hope or expectation" of lenient treatment is not something that needs to be disclosed under Brady, citing Alderman v. Zant, 22 F.3d 1541, 1549 (11th Cir. 1994). Respondent is right that an implicit understanding that Hessling might receive lenient treatment, as opposed to an actual agreement, does not constitute a violation of Brady, as set out in Giglio v. United States, 405 U.S. 150 (1970). Under Williams v. Calderon, 52 F3d 1465, 1474-1475 (9th Cir. 1995), even the suggestion by a prosecutor that a defendant could expect better treatment in exchange for helpful testimony elsewhere does not amount to Giglio material absent proof of an actual agreement. The notations on the docket could suggest that some agreement might have been formed, but the opposite is equally possible. Petitioner has not advanced any evidence of such a deal, other than to note that Hessling failed to fulfill terms that would have greatly reduced the punishment she later received.

There is a failure to show the existence of an actual agreement. Hessling's welfare fraud was introduced to the jury along with the insinuation that she was testifying against Petitioner in exchange for leniency, RT 1677. This showing does not undermine confidence in the outcome of Petitioner's trial.

Petitioner also argues a Brady violation connected to Flores, arguing that she was "paid cash" by the state shortly before or after Petitioner's trial, in contradiction to her testimony at trial that she was not receiving any inducements 'to testify. Respondent argues that she received a standard payment of witness fee and mileage after her testimony, and Petitioner has developed no evidence to dispute that claim. The Court finds no Brady violation.

Petitioner claims that a videotape of an early interview of Jarrod Hessling was not turned over to him. That videotape, he argues, is exculpatory as it supports his claim that Jarrod would have testified that a white person committed the murder. However, Petitioner has not supported his allegation that such a videotape exists. This matter has been contested in the state courts as part of a California Public Records Act litigation, and Petitioner has not supplemented his original allegation with any supporting evidence. It appears from the record that the belief such a videotape existed arose from the misidentification of a videographed "microscopic analysis" of the crime scene. There being no basis to accept that a witness videotape exists, the Court cannot find a Brady violation.

As part of his general aim to show that the Hessling/Henricksen household attracted a bad element, Petitioner claims that there was a Brady violation because the state did not disclose that illegal drugs were found at the crime scene. Again,

as in the allegation about the videotape, Petitioner cites only an unnamed source for this allegation that a "baggie" was found at the scene and provides no support for the claim. Having failed to support or flesh out this allegation, Petitioner cannot prevail on his contention that it establishes a Brady violation.

Petitioner also asserts a neighbor overheard a female voice yell "I am going to kill you!" and was so unnerved by this that he had the police visit the house. He projects this threat onto Rodgers, and asserts that he could have used it to show a sufficient threat against her from inside the house to raise doubt about his guilt. However, without more about that incident, it cannot be said that it would be material to the issues at trial or even be admissible as part of an attempt to portray the house as a place of potential violence. There is no identification of the speaker or the person being addressed, the setting, the date, or, most significantly, the result of the police call alleged to have taken place in response. Such unsupported and undeveloped allegations cannot serve as the basis for a successful Brady claim. J. Claim X- The State Failed to Conduct a Full Investigation

Petitioner claims his right to due process was violated because the state failed to investigate and gather potentially exculpatory evidence. There is no case law supporting the theory that such a failure to act, when not committed in bad faith, can be the source of a Constitutional claim, Arizona v. Youngblood, 488 U.S. 51, 58, (1988); Miller v. Vasquez, 868 F.2d 1116, 1120 (9th Cir. 1989). To support his claim of bad faith, Petitioner argues that police ignored the testimony of the children and focused on him because he had burglarized the house shortly before the murder, and because the police ignored "overwhelming" evidence of drug dealing at

the house, such as illegal drugs found at the murder scene.[FN4] The test for bad faith is whether the police's "conduct indicate[s] that the evidence could form a basis for exonerating the defendant," Miller, 868 F.2d at 1121. This evidence fails that test. First, the police repeatedly questioned the children. Their stories were confused, contradictory, and inherently unlikely. The police's focus on Petitioner was not bad faith, but the common practice of starting with a likely subject. Finally, as noted above, Petitioner has not produced any evidence of drugs at the murder scene. His support for branding the house a drug-dealing site comes from neighbor Josephine Cruz' undeveloped observation that cars would come and go during the day. Other possibilities are raised by Petitioner, from the crime-besieged nature of the surrounding neighborhood to assessments of Henricksen's general character, but he does not show conduct by police of neglecting a specific line of inquiry likely to lead to his exoneration. Having failed to meet the high standard set by Youngblood, Petitioner must be denied relief on this claim.

FN4. Petitioner has not provided further evidence of had faith, despite stating that he would use the discovery process of the federal habeas process to add additional facts.

K. Claim XI- Right to Counsel During Police Interrogation

Flores was contacted by the police after Petitioner was arrested for the Rodgers murder, and agreed to wear a tape-recording device to question Petitioner upon his release. Flores was known to the police because she had filed an assault charge against Petitioner a month earlier.

Petitioner argues his Constitutional rights were violated by the use of his tape-recorded conversation with Flores because of his Sixth Amendment right to

legal representation during the pendency of adversary proceedings.[FN5] Petitioner states proceedings were on-going against him in three other matters when Flores questioned him about the murder, and the recorded conversation touched upon both prior charges. For these reasons, Petitioner argues, his conviction was unfairly obtained.

> FN5. Petitioner also argues that he had a right to counsel triggered by a state statute due to overdetention prior to arraignment. The Court notes that this claim was denied in the state courts, and declines to find a Federal Constitutional violation out of a state statutory entitlement.

Those claims were denied by the State courts upon trial motion and upon appeal, finding that the right did not attach until the formal commencement of proceedings. No charges had been filed for the assault on Flores or upon the burglary of the Hessling/Henricksen house, and the courts found that the burglary of the residence of Murline and Milton Owens on November 7th had insufficient attachment to the investigation here. Under McNeil v. Wisconsin, 501 U.S. 171, 175-176 (1991), the right to counsel is "offense specific," meaning that it only applies in connection to questioning related to offenses for which the right to counsel has attached. Petitioner argues that he was asked questions connected to the Owens burglaries, but he provides no examples. The record— containing only a statement on the tape by Flores that Clair had "been known for fuckin' burglaries"— does not support that allegation. The fact that the Owens burglary was introduced as an item in aggravation in the penalty phase does not relate it to the Rodgers murder or the house burglary for these purposes.

Although not strenuously argued by Petitioner, the Court has considered whether Petitioner was entitled to Miranda warnings before his conversations with Flores, and has concluded that he was not. The conversations were not of a custodial nature, as required under Miranda v. Arizona, 384 U.S. 436, 444 (1966). Petitioner was free to leave or terminate the conversation with Flores, U.S. v. Juvenile Male, ___ F3d ___, 2005 WL 1316992 (9th Cir. June 2, 2005). The Court denies these claims.

K. Claim XII

Claim XII has earlier been denied on the merits by this court's Order of August 22, 1997.

L. XIII- Jurors' Receipt of Extraneous Material

Petitioner argues his Constitutional right to a fair trial was violated because the jury received an unredacted copy of the Flores tape and transcript following the close of the prosecution's case in chief. Material had been designated for exclusion from the transcript because it referred to other accusations that were judged to be irrelevant and prejudicial. When the jury retired before the start of the defense case, it took the copy of the transcript with the designated sections into the jury room for approximately one hour, along with the other evidence in the case.[FN6] The trial court did not question the jurors about whether they had inspected the material after the error was discovered, and did not question them immediately after it was reported in the press that they had access to material that had been excluded.

FN6. The unredacted tape recording is not discussed because it appears uncontroverted that the jurors did not have a tape player available to them during the time they had the unredacted tape

After the verdict was in, the court questioned the jurors about the transcript. Six of them reported noticing the different versions, and one recalled noticing material referencing burglaries which was marked for exclusion. Another recalled reading a mention of Petitioner's assault upon Flores. In addition, Petitioner charges that the questioning by which the trial court attempted to determine the degree to which the jurors were affected by the material was flawed because it took place after the verdict, was unsworn, was voluntary, and did not ask whether they had access to the press reports of the event. The reports in the press are immaterial here, as there is no allegation or evidence that they violated their oaths as jurors and read the press reports. The essential inquiry here is whether Petitioner was prejudiced by the jury's access to the transcript.

The Court concludes Petitioner was not prejudiced. Although the trial court may properly be second-guessed as to how it handled the issue, the Court finds that even if the material had been viewed by many more members of the jury there would be no prejudice to Petitioner. The Court find that there is no reasonable possibility that this material affected the verdict, Marino v. Vasquez, 812 F.2d 499, 504 (9th Cir. 1987). Neither Petitioner's alleged assault on Flores nor the reference to burglary are prominent features in the transcript, nor are they likely to be particularly material to the jury's consideration of the evidence in the burglary and the Rodgers murder. Such statements, fleeting and unexplained, were more properly excluded, but they are harmless and do not merit relief. This claim must be denied.

M. Claim XIV- Petitioner Not Present During Extraneous Material Questioning

Petitioner argues the trial court deferring asking the jurors about their receipt of the extraneous material until after they delivered the verdict, and then pressured him into waiving his right to be present during that questioning, without explaining the process or receiving a written waiver. He argues that the trial was not then "over" because it dealt with a live issue concerning matters that occurred in the middle of the trial. Accordingly, he had a right to be present at any stage of the trial where his presence could have made a difference, and his presence would have added "solemnity" to the questioning of the jury. However, there was a waiver which appears valid. Even assuming the waiver of his presence was ineffectual, the Court cannot find that the exclusion was prejudicial. As noted above, the Court has found that the passing mentions of Flores' complaint against Petitioner and references to burglary were harmless. Petitioner's argument that his knowledge of the contents of the tape and the solemnizing aspect of his presence during the trial court's questioning might have rendered the proceeding more fair are unconvincing. The claim does not merit relief.

N. Claim XV- Admission of Photographs

Petitioner claims he was denied a fair trial because gruesome, prejudicial photographs were admitted into evidence that did not have sufficient probative value to justify their inclusion. He argues that there were no issues about the identity of the victim, the cause of death, or the state in which the body was found. Graphic depictions of wounds, fecal matter, and the specific display of the "horror of death" on the victim's face were admitted. He claims that this inclined to jury to seek "retribution" against him because of the horror of the slaying.

For admission of such evidence to merit reversal upon federal habeas corpus review, Petitioner must show more than that the photographs were admitted despite a lack of relevance to any element of the charged crime. There were elements of the crime evidenced by the photographs. The .state court correctly cited intent and malice as justifications for their admission, Clair, 2 Cal. 4th at 660. The Court also finds that the admission of the photographs did not result in a verdict based upon emotion, rather than reason, in violation of the Eighth Amendment, Beck v. Alabama, 447 U.S. 625, 637 (1980). The trial court and counsel attempted to find a middle ground wherein the people presented their evidence of the intent and brutality of the crime, as they were allowed to do, while maintaining the Petitioner's protection against an overwhelmingly shocking depiction of the horror of the crime. The Court finds they did a Constitutionally acceptable job, and declines to grant relief on this claim.

O. Claim XVI- Exclusion of Henriksen's 1965 Voluntary Manslaughter Conviction

Petitioner claims he was denied a fair trial and other rights because the trial court improperly prevented him from introducing impeachment evidence of Henriksen's 1965 plea to voluntary manslaughter. He argues that Henriksen was an important witness against him, and implies that Henriksen had a weak alibi for his presence that evening. He suggests also that Henriksen lied to place the blame on him so as to avoid inquiry into his drug-dealing activities. Such innuendo is immaterial. The trial court excluded the mention of the plea, despite finding it "marginally relevant," RT 1473, because it was an event 20 years in the past. Petitioner argues there was no "prejudice" to Henricksen that would have resulted from admitting

the plea, and that it should have been admitted despite its age. Neither party has found on-point authority dealing with old convictions of non-defendant witnesses, which is most likely due to the fact that such convictions have little value. Finding that the 1965 plea lacks relevance to the fairness of Petitioner's conviction, the Court denies relief on that basis.

P. Claim XVII- Sufficiency of the Evidence

Petitioner claims no rational trier of fact could have found him guilty based upon the evidence presented against him, and that his conviction was therefore obtained in violation of due process. He argues that the Hessling/Henriksen testimony about the items stolen from their house that were seen with Petitioner was unreliable because they had motivation to lie to cover up their own activities, to curry favor with authorities, and simply to frame a black man. Petitioner argues their testimony regarding the stolen items did not clearly distinguish between the two burglaries. Further, he argues that Flores was an unreliable witness, noting that she has had elements of her story change in each retelling, and that she suffered from mental problems resulting from injury and the use of alcohol and drugs.[FN7] Finally he argues that the tape of the conversation he had with Flores was unreliable and subject to "conflicting inferences" because of his speech patterns and background. The first two arguments suffer similar flaws.

> FN7. After the close of briefing, and well after time has passed for the introduction of new material, Petitioner filed a set of declarations with the Court on June 3, 2005. In the declaration, Flores speaks of suffering a "critical" head injury nine days before the murder, and tells of how that

assisted the police in manipulating her to implicate Petitioner. She tells of how, with the assistance of the habeas investigator, she has become convinced that she could not-and did not see Clair at all on the day of the murder. Supporting declarations are filed stating that she was unable to leave the house for weeks after her injury. Flores' declaration has an uncertain character. She is not so much recanting as informing the Court that she has been told that she could not have seen what she testified to, and that therefore she wishes to recant. Recantations are "looked upon with the utmost suspicion," United States ex rel. Sostre Festa, 513 F.2d 1313, 1318 (2d Cir. 1975) and "[r]ecanting testimony has long been disfavored as the basis for .a claim of innocence. Appellate courts, even on direct review, look upon recantations with extreme suspicion [citations omitted]," Carriger v. Stewart, 132 F3d 463,483 (9th Cir. 1997) (dissenting opinion, J. Kozinski). Recantations made long after a prosecution, especially by those with ties to the defendant or at no risk of prosecution, are easily made and difficult to weigh. Flores' derivative recantation will be considered as part of the argument Petitioner made about the sufficiency of her testimony, but will be appropriately discounted because of its nature and lack of conviction.

Both the Hessling/Henricksen and Flores testimonies were challenged at trial. Petitioner here attacks Hessling's testimony as unreliable because she was under indictment for welfare fraud and perjury. The jury was aware that she was under indictment, although the exact terms were somewhat

unclear, RT 1978-1979, and it was alleged that she was testifying in hopes of lenient treatment. Petitioner argues that Henricksen's testimony was not credible because of various elements of bad character he says Henricksen possessed, such as belonging to a "drug dealing" motorcycle gang, having a violent temper, being racist, and committing assaults. Henriksen was an unimportant witness, and Hessling's flaws were before the jury. No facts have been introduced that lead this Court to overrule the jury's assessment of their credibility.[FN8]

> FN8. Petitioner has cited juror declarations stating that they believe they would have reached a different verdict 'if they had only known' certain facts. Such hypothetical and constructed declarations are not worthy of consideration, Federal Rules of Evidence, 606 (b); McDowell v. Calderon, 107 F.3d 1351, 1367-1368 (9th Cir., 1997) (reversed on other grounds). Except where explicitly admissible under FRE 606 (b), such declarations have not been evaluated.

Flores was key to the prosecution's case, but it was not for the truth of the matters she asserted. Petitioner himself sets out a list of reasons why her testimony was problematical: "her severe head injury and admission that her memory was not good after her accident; the alcohol and drugs she consumed that made her 'looney;' her admitted 'personal vendetta against Kenneth Clair;' and the 48 times she changed her story." First Amended Petition, pg. 157. Her injury, its severity, and the fact that shortly after her release from the hospital she was again drinking large amounts of hard liquor were all before the jury, RT 1745-1749. Many of the contradictions between preliminary hearing testimony and that at trial were brought up by either

the prosecutor and defense counsel, e.g. RT 1753, 1775, 1776, 1780 et seq. (prosecution), RT 1812, 1813, 1816, 1829, 1830, 1834-1835, 1839, 1851-1852, 1863, 1867-1868 et seq. (defense). In reading the transcript it is clear that Flores' testimony is rambling, disjointed and conflicting. If there were no corroboration, it would be impossible to support a conviction based on her testimony alone.

Petitioner notes that Hessling and Flores support each other as to the details of what items were stolen from the house and what Petitioner allegedly showed Flores the night of the murder. He points out that both witnesses have their credibility problems, and that Flores' tale of the display of the stolen items is particularly fluid as to details. Again, these matters were before the jury. Further, the key piece of evidence against petitioner was the tape recording of his conversation with Flores, which does corroborate some parts of her story. Accordingly, Petitioner attacks the reliability of the tape recording.

Statements made by Petitioner regarding jewelry stolen from the house are argued to relate to the earlier burglary, rather than one committed as part of the murder. Petitioner's statement that it could not be proven that he committed the murder arose, he argues, out of the fact that he did not commit the murder. Likewise, other statements wherein he dodges the question of whether or not he killed Rodgers are explained by him as rooted in his use of "Ebonics," a linguistic trait that led the jury to misunderstand him. These points are all arguments related to the interpretation of evidence, which was the province of the jury. The jury heard all the reasons to believe or disbelieve what was said on the tape, heard the tape, and reached their conclusion. Petitioner urges the Court to believe that no rational

trier of fact would have found him guilty after hearing that evidence. All these avenues of interpretation were open to the jury, however, and they rejected them.

On the tape, Petitioner evades her questions about whether he committed the murder, telling Flores to "leave that alone," to "get that shit off your mind," and that she doesn't "need to know" about what happened. He also says "they can't prove nothing on me," and tells her "they can't prove a motherfuckin' thing. Not unless you open your motherfuckin' mouth." When she tells him investigators are asking her about the jewelry, describing the jewelry she had seen, he says "How come you think I didn't give you none of it?" She mentions having seen him that night with a limp and blood on him, and he replies "Ain't on me no more." When asked about the jewelry he had shown her, he says he threw it away; an act that would make little sense unless it was evidence connecting him to the murder. To lift her spirits, he tells her "Pick your head up, Pauline. They can't prove nothing. Can you understand that?"

Flores reminds Clair .about how he came out of Wilshire Sweet with "speakers, the jewelry, and the Goddammned six pack of Budweiser. That's not fucking funny. You murdered a girl." He responds only to ask her "Will you leave that alone, please? You don't have to rub that in my motherfuckin' soul." She complains about how she's involved in the crime because she was outside the house that night, and he responds that "them fucking people can't prove you was round there or I was round there." He urges her to make up an alibi for that night, to "[s]ay you was with your parents, you know your motherfuckin' parents, gonna cover for you." She continues to fret, and he explains "Baby, what you fail to realize, how

the motherfuckers they gonna prove I was there? ... There ain't no motherfucking fingerprints, ain't no fuckin' where in there, and ain't no fucking body seen me go in there and leave out there." These statements corroborate the essential outline of Flores presence that night, the time frame, the taking of jewelry, and the murder. Although Petitioner did not specifically admit to the murder, and does at one point directly deny it, there is plenty of material in his statements to allow a rational trier of fact to find Petitioner guilty.

The Court finds that the evidence was sufficient to support a finding of guilt, Jackson v. Virginia, 443 U.S. 307, 319 (1979). The claim for relief must be denied.

Q. Claim XVIII- Ex Parte Communications Between Judge and Prosecutor

Petitioner claims there were ex parte communications between the prosecutor and the trial judge, which would be violations of due process if they were discussing matters relating to the merits of the case, Haller v. Robbins, 409 F.2d 857, 859 (1st Cir. 1969). The Court, upon motion for evidentiary hearing, found that there was insufficient evidence of such communications but allowed the Petitioner an opportunity to supplement his claim with more specific allegations. Having reviewed the submission provided by Petitioner, and Petitioner having rested on the briefing provided in his First Amended Petition and Traverse, the Court finds that no evidence of such improper communication has been provided. The Court denies the claim on that basis.

R. Claim XIX- Prosecutorial Misconduct at the Guilt Phase

This issue was first raised by Petitioner is a claim of prosecutorial misconduct by misstating the law concerning a Batson violation in argument with

the Court and by implying to the jury that a special circumstance could be found by a mere preponderance of the evidence. Argument of issues of law to the Court, even if erroneous, has not been held to be sufficient basis for a misconduct claim. The statement cited by Petitioner that the prosecutor argued that a special circumstance is either "true or not true" rather than "guilty or not guilty," RT 2157, lns. 14-15, might be interpreted as setting a lower standard than 'beyond a reasonable doubt,' as required by law. However, the prosecutor corrected any such impression in his comments almost immediately following, stating that the elements of a special circumstance must be proved beyond a reasonable doubt, RT 2158, ln. 11. The Court finds that the implication of that statement does not require reversal.

Two lines of argument to the Court by the prosecutor are put forth as misconduct because they were made despite being factually inaccurate: arguing Petitioner smoked cigarettes while in the house despite lab tests indicating that they were smoked by the victim, and arguing a photograph of a head wound demonstrated the location of the body. Petitioner argues that both statements were apparently untrue; it was later stipulated that testing cleared Petitioner from having smoked the cigarettes, and it is apparently self-evident that the head photograph did not display the location of the body. However, the discussion of the photograph is limited to the question by the trial court whether that was "the way they found her," to which the prosecutor replied that it was taken before she "was touched or moved," RT 1486-1487. The prosecutor later added that the photograph shows "what he did to make sure she was dead. That's the way he left her," RT 1486. The Court does not find misconduct

in connection with the photograph of the head wound, as the prosecutor did not make the statements attributed to him by Petitioner. The statement regarding the cigarette butts, even if untrue when made, was apparently only made to the Court in connection with admitting a crime scene photo into evidence. Petitioner has not alleged that the cigarette argument was made anywhere else at trial, and a juror is unlikely to make the suggested inference. The prosecutor's action did not involve a presentation of false evidence to the jury, and the Court finds any wrongdoing too minor to merit reversal.

Petitioner alleges a violation of Petitioner's rights against self-incrimination under Griffin v. California, 380 U.S. 609 (1965), by the prosecutor's misconduct in making repeated comments in closing argument that contrasted Petitioner's comments on the Flores tape recording to his silence elsewhere. The California Supreme Court found, and Respondent argues this Court should find, that the comments were directed at Petitioner's unprivileged pretrial silence or his evasions in response to questions on the Flores tape, or that they referred to the defense's failure to introduce evidence that would otherwise be expected, Clair, 2 Ca1.4th at 663.

The latter is true for several of the comments highlighted by Petitioner. The first two statements explicitly reference the silence of the defense: "no explanation for that statement from the defense" and "did you hear an explanation otherwise from the defense?" FAP at 211, lines 7-8 and 18-19.[FN9] The next argument complained of asks rhetorically if the jury has 'any other explanation" FAP at 211, lines 26-27, for why Clair threw the jewelry away. This does not comment on Petitioner's right to silence. Likewise, in a comment relevant to the recent Flores

declaration, the prosecutor asks if there is "any scintilla, or one shred of evidence," FAP 212 at lines 11-12, that he was not with Flores on the night of the murder, as the tape implies. Although Petitioner would be a prime witness for an alibi, there are numerous other ways that one could be established.[FN10] That was not necessarily a comment on his silence. In addition, that argument came in rebuttal, after defense counsel has argued that the date line presented by the prosecution is wrong. The prosecutor asked where the evidence was for that claim. At that point, a Griffin objection was made, RT 2222, and overruled by the trial court, who nonetheless cautioned the prosecutor.

> FN9. Citations are to Petitioner's Petition, rather than the record, so as to consider each of his claims in the order they were made.
>
> FN10. Petitioner argues elsewhere that an alibi would have been available through Curtis Lee, who claims to have been drinking with Petitioner on the night of the murder.

Petitioner next objects to a section where he asks if "we hear repudiation from Mr. Clair that she is wrong about the date she is shown the jewelry?" FAP 212 at lines 24-25. This comes immediately after stating "[w]e hear them talking

on the tape," and, from context, it is fair to assume that he is asking why Petitioner did not controvert her on the tape recording.

Petitioner objects to a comment that the jury has not heard "any evidence to repudiate or deny that that is true, that he left her by the tree and was gone for an hour or more?" FAP 213 at lines 7-10, and where the prosecutor repeatedly asks for an explanation of comments on the tape relating to a cut on Petitioner's hand and his remark that "the blood

ain't on me no more." FAP 213 at lines 15-20. Again, Petitioner argues that he would be the best source for such explanations, and that the comments are thus references to his failure to testify. The Court does not agree. In context, the prosecutor is responding to defense counsel's closing argument. Rhetorically, he is asking whether counsel succeeded in explained away each circumstance. The close identification between counsel and client leads to imputing the faults of one on the other— as demonstrated by Petitioner's citation of instances where the prosecutor interchanged their names before correcting himself, FAP 213-214 at lines 27— but here the prosecutor is referring to the failures of counsel's presentation, not upon Petitioner's failure to testify. Although it could be interpreted, out of context, that the prosecutor was directly challenging Petitioner's silence, the Court finds that his comments were directed to the defense.

Petitioner claims misconduct by the prosecutor in making a reference to "the old Supreme Court," but objection to that comment was sustained, and no particular significance is shown as to the entire colloquy. Petitioner repeats his claim of misconduct based on the allegation that the prosecutor and the trial judge had ex parte communications about the case. Having found insufficient evidence to support the claim that such communications took place, the misconduct claim is denied.

Petitioner's request for relief based upon prosecutorial misconduct is denied. S. Claim XX-Ineffective Assistance of Counsel at the Guilt Phase

Petitioner argues he received ineffective assistance of counsel, depriving him of his rights to a fair trial, competent counsel, and a reliable determination of guilt. To prevail, Petitioner must show that his representation fell below a standard of

objective reasonableness and show a reasonable probability that the error prejudiced the verdict, Strickland v. Washington, 466 U.S. 668, 687 (1984). The representation must be shown to amount to "gross incompetence," Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). Courts should allow trial counsel latitude for strategic decisions, require only reasonable investigation of claims, and not blame them in hindsight for relying upon information imparted by or on behalf of their clients. The self-immolating declarations provided by former trial counsel are neither determinative nor particularly illuminative, *Hendricks v. Calderon*, 70 F.3d 1032, 1039-1040 (9th Cir. 1995). Finally, the error must be shown not to have only a "conceivable" effect upon the verdict, Strickland, 466 U.S. at 693, but it must be demonstrated that the verdict is unreliable or that the proceeding was fundamentally unfair, Lockheart v. Fretwell, 506 U.S. 364, 368-370 (1993). Petitioner's assertions of inadequate assistance must be taken in context of counsel's overall performance, Wade v. Calderon, 29 F.3d 1312, 1325 (9th Cir. 1994), and not piecemeal. This claim was granted evidentiary hearing in this Court on August 20th through 24th, and, among other witnesses, defense counsel Julian Bailey appeared.

Petitioner presents numerous grounds on which he alleges ineffective assistance of counsel. The Court will consider them, and evaluate the cumulative effect of the acts of claimed deficient representation on the outcome at trial.

First, Petitioner argues that counsel failed to adequately investigate the case so as to make his later strategic decisions reasonable under the Strickland test. This was Mr. Bailey's first death penalty case, and he retained a private investigator, David Sandberg ("Sandberg"), with whom he had

never worked. Sandberg was experienced, having worked five previous death penalty cases. Petitioner argues that Sandberg was insufficiently supervised, but the Court finds no evidence that Sandberg needed directing or that any material evidence was left unexamined due to a lack of supervision. Petitioner lists a number of leads that he states were insufficiently explored, but only a few of them are shown to result in anything that could be presented to the jury. To prevail on this claim, Petitioner must demonstrate that some "compelling evidence" would have been unearthed by proper investigation, Ceja v. Stewart, 97 F.3d 1246, 1255 (9th Cir. 1996).

Petitioner alleges that there was insufficient investigation of statements by children in the house regarding the crime, such as Jarold Hessling's identification of the killer as white, Kimberly Henriksen's statements that a white man had broken into the house and that a white female struck the victim, and Krissie Roger's statement that the "black man didn't do it." Review of the evidence available from the initial investigation and from the developed record makes clear that the testimony of these very young children— Kimberly, the oldest, was six, and Jarrod., the 'lead' witness, was five— was not presented because the children's testimony changed a number of times and was inherently unlikely, and not due to any investigatory neglect. Although the statements by the children might appear exculpatory, they reported a number of different versions involving a mix of races and numbers of people. Their testimony can not be said to have been likely to have any effect on the verdict.

Petitioner also alleges that the victim, the adults in the house, and the neighborhood were insufficiently investigated. Among other things, he alleges that the victim was an abused "house mouse,"

that Henriksen had a history of violence toward women, dealt drugs, and belonged to a biker gang, and that the neighborhood they lived in was crime-ridden. Assuming these things to be true, they do not present relevant, much less compelling, evidence. There is no payoff to these items in terms of significant evidence that could have been presented at trial that was left uncovered. The investigation was not inadequate.

Petitioner raises the specter of an omitted alibi witness, in the person of Curtis Lee ("Lee"). Lee was initially interviewed by Sandberg, and Lee told him he was confident he spent some time on the night of the murder drinking and playing pool with Petitioner at "The Pub" because November 15th was a Thursday night and Lee always drank there on Thursdays after getting paid. Had Petitioner not met him that night as he usually did, Lee believes he would have noted that fact. According to Sandberg's report on his Interview of Lee, Lee had no specific recollection of meeting Petitioner on November 15th. Subsequent to his interview by Sandberg, Lee disappeared and could not be located. Lee fails as an alibi witness. First, his testimony was not sufficiently definite to provide a solid alibi. But, second, he was not available to testify at Petitioner's trial, having moved without leaving contact information. Petitioner argues elsewhere that the loss of contact with Lee was deficient representation, but it was not failure to investigate.

Petitioner argues that Bailey rendered ineffective assistance of counsel by failing to effectively use co-counsel, and that co-counsel failed to effectively represent Petitioner. Respondent points out that Petitioner has failed to make a specific showing of acts or omissions in connection with this claim. Having reviewed the FAP, Traverse,

and the supplemental briefing on this point, the Court agrees.

Petitioner argues that counsel failed to present a constitutionally adequate guilt phase defense. He relies on the items disposed of above, as well as some matters that he claimed were not fully investigated that arguably have independent factual significance. The Court considers each in turn.

Petitioner argues that counsel should have presented evidence that the household was observed by the neighbors to be rowdy, with sounds of fighting and yelling audible. Assuming that such evidence, specific to the time period preceding the murder, could be gathered and presented, Petitioner has nonetheless not set out of what it would be probative. Assuming that he seeks to imply that Henricksen was responsible for the murder,[FN11] he lacks other evidence. Henriksen's misdemeanor plea to battery is insignificant without more detail or development. The victim's statement to her mother that she feared she would not live to her next birthday does not implicate him; it would imply regret for her life choices. That meshes with Petitioner's item alleging that the house was a drug dealing site, but, as noted above, Petitioner has provided no support for that allegation other than an anonymous allegation and a neighbor's report of traffic around the house.

> FN11. Petitioner also alleges that Henricksen and Hessling were "dressed for a night on the town" when they left to do the towing job that was their alibi for the evening. Presumably he implies they were lying about their plans, but it cannot be that he is alleging that Henriksen dressed formally to prepare to beat Rodgers to death, and he does not explain how that could relate to any other matter connected to the killing.

Other areas Petitioner argues counsel was deficient for omitting to present include "evidence" that the state's interpretation of his statements on the Flores tape was incorrect. Petitioner proposes to have an Ebonics expert attempt to convince the jury that they did not correctly understand what they heard. The Court disagrees, finding that the significant statements on the tape were understandable to persons of ordinary learning. In addition, counsel argued against the State's interpretation in closing, which was likely as effective as would have been presentation of an expert. Petitioner suggests the use of an expert on blood spatter to testify that Petitioner would have had "some spray" on him from the beating given the victim. As this case does not involve the immediate apprehension of the suspect, Petitioner could have removed substantial evidence before encountering Flores. Such speculation on the amount of spatter would not have been significant.

Petitioner argues that Flores was insufficiently impeached, arguing that she was considered a pathological liar and that she was suffering the effects of Dilantin toxicity and her head injury on the night of the murder. He provides a number of witnesses who would have provided that information, from lay friends and acquaintances of Flores, to proposed toxicological and medical experts. However, as noted above, Flores' direct testimony is of little importance to the case, serving only as a bridge through which the tape and its corroborations and admissions enter the case. There was sufficient impeaching material before the jury that more would have been cumulative in effect.

Finally, the Court notes that the late-filed declarations of Flores, Perry, and Brown support Petitioner's argument here that Flores was mistaken

as to her actions on the night of November 15th, and that Petitioner has consistently argued that Flores would have been significantly mentally impaired from the combined effects of injury, drug, and alcohol use on the night of the murder. However, the late-filed declarations prove too much. For the first time it is alleged that Flores was so badly injured that she was incapable of leaving the house unassisted for "weeks" after her accident on October 31, 1984. This is inconsistent with the tape recorded discussions between Petitioner and Flores, where she mentions waiting for him that night and him coming out with the speakers, jewelry and beer. They discuss her "story" for that night, and she says her story "works out" because she claimed she told them she "couldn't walk and couldn't talk." Later they talk about her parents covering for her "about November fifteenth." Flores may have been addled, but Petitioner was not. The late-filed declarations are not credible.

Petitioner also argues here that counsel failed to investigate and present evidence of viable mental state defenses. In support, Petitioner introduces many facts, which, for this purpose, the Court will assume to be both true and unknown to trial counsel. Petitioner's mother was heavily medicated during her pregnancy with him; he has suffered childhood abuse and neglect, including blows to the head; he self-inflicted blows to the head as a child; he has had frequent sinus headaches; and he committed alcohol and inhalant abuse. He cites the following difficulties in his life leading to psychological problems: his mother was an irresponsible teenager, unable to properly raise him; he was malnourished, abused and neglected as a child; he was often left alone as an infant; he was frightened and cruelly treated by his mother; he lacked contact with his biological father; he was raised by a physically

abusive uncle; during adolescence, he had mutual dislike with his stepfather; he suffered depression and 85-pound weight loss before his mother's marriage; he had behavioral and educational problems resulting in his dropping out of high school; he abused drugs, alcohol and inhalants from the ninth grade; he received psychological treatment at age 16; and he spent 5 years at the infamous Louisiana State Penitentiary at Angola. Correspondingly, he argues that competent counsel would have raised a defense of insanity or used these markers of mental disease and disorder to negate intent to kill or burglarize. The Court does not agree. As unfortunate as the events of Petitioner's life have been, there is no colorable showing that Petitioner could be considered legally insane or incapable of forming specific intent. Counsel cannot be faulted for failing to raise a defense for which there is insufficient support. Between declaring innocence and disclaiming responsibility due to defect, counsel's choice was better.

Petitioner argues that his counsel was derelict in moving to delay the trial and in not opposing other delays to the trial date, which resulted in the trial being moved from its initially scheduled date of January 10, 1986, slightly less than one year after his arrest, to its start date of June 22, 1987. He argues that he was prejudiced by this because a number of witnesses could not be located at time of trial. Petitioner has not shown that any of his witnesses would have been located at the original time of trial but could not be located eighteen months later. Further, none of the witnesses listed as unavailable would have given significant testimony. The Court finds that Petitioner suffered no prejudice from the postponements of the trial date.

Petitioner also argues ineffective assistance of counsel if his counsel failed to preserve his objection to the admission of the Flares tape on the basis of his right to counsel and Miranda warnings. Having decided above that such objections were unavailing, the Court cannot find counsel ineffective for failing to preserve them. Likewise, the Court declines to find counsel ineffective for failing to ask jurors whether they read press reports about their access to the unredacted transcript of the Flores tape. Petitioner argues that counsel was deficient for failing to preserve his right to be present at the post-trial questioning of jurors, but the court has already decided that his absence was pursuant to waiver and was harmless. Similarly, Petitioner argues that his counsel was deficient for not preserving a Griffin objection during all parts of the prosecutor's argument in which he seemed to comment on Petitioner's choice not to testify at trial. Having found no Griffin violation, the Court cannot find counsel deficient on that basis. On the same basis, the Court cannot find counsel deficient for failing to object to alleged but unsupported ex parte communications between the trial judge and the prosecutor.

Petitioner also claims ineffective assistance of counsel because Bailey did not make a request for any jury instructions. He argues that Bailey should have requested the jury be instructed not to place undue emphasis on the Flores tape because it was illegally obtained and ambiguous. The Court does not agree with the predicate of that statement. The tape was not illegally obtained, and it was the jury's province as the finders of fact to determine if it was ambiguous. The Court cannot say that undue emphasis was given to the Flores tape. Petitioner argues that counsel was deficient because he did not

request an instruction telling the jury that each and every element of the offenses had to be proved beyond a reasonable doubt, resting on the standard instruction CALJIC 2.90 that said that the state had to prove its case beyond a reasonable doubt. The instructions given the jury were proper. While Petitioner would have gained a hypothetical edge from the suggested instruction, it would not have affected the jury's deliberation nor had any effect upon the jury. The Court cannot find ineffective assistance of counsel on this basis.

Reviewing all the allegations of deficient performance by trial counsel in connection with the guilt phase, and considering them in light of counsel's overall performance, the Court finds that Petitioner had Constitutionally adequate representation. Accordingly, this claim must be denied.

T. Claim XXI- Right to Experienced Counsel

Petitioner claims that his Constitutional Right to assistance of counsel was violated because Bailey was representing his first capital defendant. He argues that Bailey was not qualified under the National Legal Aid and Defender Association's "Standards for the Appointment and Performance of Counsel in Death Penalty Cases." The National Legal Aid and Defender Association is not the credentialing body for capital case representation in California, and Petitioner has no Constitutional right to counsel above or beyond the Strickland standards of competence. This claim must be denied.

U. Claim XXII- Erroneous and Confusing Jury Instructions

To prevail on a Federal Constitutional claim based upon instructions given the jury, Petitioner must show a reasonable likelihood that the jury has applied an instruction "in a way that prevents the

consideration of constitutionally relevant evidence," Boyde v. California, 494 U.S. 370, 380 (1990). It must be shown that the jury instruction "so infected the entire trial that the resulting conviction violates due process," Cupp v. Naughten, 414 U.S. 141, 147 (1973). Petitioner notes that the form of the specific instruction he challenges, CALJIC 2.90, has been upheld upon challenge to the Supreme Court, Victor v. Nebraska, 511 U.S. 1, 22 (1994). The Court stated that it did not "countenance its use," ibid., but found that it was not Constitutionally deficient. Petitioner argues here that any dilution of the standard of beyond a reasonable doubt, such as caused by CALJ1C 2.90's reference to "moral certainty" would deny him his right to a fair trial because his case involved a brutal and graphic crime. The Court disagrees, finding no likelihood that jurors would be so misled by the terms of the instruction.

Petitioner also argues that his right to a unanimous verdict was violated because the jurors received a physical set of jury instructions that had handwritten portions and crossed out material that was nonetheless legible. He argues that the jury should have been given an instruction not to consider material which was crossed out and not to speculate about the significance of any revisions. Although not an ideal .situation, the Court finds that the sloppy presentation of a written copy of jury instructions to the jurors does not so infect the trial such as to threaten the integrity of the verdict, Cupp, supra. The Court therefore denies relief on this claim.

V. Claim XXIII- Cumulative Effect of Constitutional Violations on the Guilt Phase

Petitioner urges the Court to find that the cumulative effect of any errors and constitutional violations found in its review of the guilt phase proceedings, while not individually requiring

reversal, manifest into sufficient prejudice and injustice so as to cause the Court to find Petitioner's conviction in violation of his constitutional rights. The Court does not find such cumulative effect, and must deny the claim.

W. Claim XXIV- Unconstitutionality of 1976 Conviction

Two circumstances in aggravation were introduced by the state at the Penalty Phase of Petitioner's trial. One of these was the armed robbery in Louisiana for which Petitioner pled guilty in 1976. Petitioner states that this conviction was unconstitutional because he was not advised of his right to a jury trial, he suffered from inadequate assistance of counsel in making the plea because his counsel did not investigate a possibly meritorious intoxication defense to the charge, and because his counsel had a conflict of interest. The Court finds that these claims are without merit. Petitioner signed a waiver explicitly stating that he was waiving a trial. Against that, Petitioner uses a hearsay statement by an investigator averring that his 1976 trial counsel told him he failed to tell Petitioner that he was waiving his right to a jury trial. Even assuming arguendo that Boykin v. Alabama, 395 U.S. 238, 242 (1969) upholds Petitioner's distinction that a waiver of a right to a "trial" is ineffective compared to the waiver of the right to a "jury trial," he has failed to prove this by any means other than his own assertion. Likewise, the Court cannot find inadequate assistance of counsel in the 1976 conviction on the basis of anecdotal evidence. Finally, the Court will not find conflict of interest on the allegation that friendship between counsel and judge would lead counsel to avoid a trial for a criminal defendant so as to avoid burdening the judge's docket. There is no support

anywhere in the law for finding a conflict of interest on that basis. Relief cannot be granted on this claim.

X. Claim XXV- Inadequacy of Proof of Aggravating Circumstance

Petitioner argued in his FAP that his constitutional rights were violated by the use of the 1976 conviction as an aggravating circumstance because it was not adequately proved by the state. Following a response by the state in its answer that the conviction was properly proven by introduction of certified copies of the Louisiana robbery conviction and that the California Supreme Court found the trial court applied an enhancement to the conviction expressly on that basis, Petitioner stated in his traverse that he would reply to the state's contentions upon final briefing. Petitioner having rested upon his previous briefing, the Court finds that this claim has been conceded and denies relief on that basis.

Y. Claim XXVI- Erroneous Admission of the "Owens Incident"

The second circumstance introduced in aggravation against Petitioner was the November 7th "Owens incident," which was a potential burglary charge involving Petitioner's presence in the Owens' apartment. A report of a break-in brought police to the apartment, where they found Petitioner lying in a bed. He claimed to have spent the night in the apartment and that Murline Owens was his girlfriend. Later, at the police station, after being advised of his rights, he admitted entering the apartment through a window "to sleep." The apartment occupants found that the apartment had been rifled, the television and videocassette recorder had been moved, a screwdriver was found nearby that was not theirs, and a butcher knife was found on the bathroom floor. Petitioner was booked and

charged with burglary, but was never prosecuted. Upon his release from holding on that charge he encountered Flores and the incriminating tape recording was made.

The "Owens Incident" was introduced as an aggravating circumstance at the penalty phase of trial. Petitioner complains that it should not have been. Before trial, Petitioner argued that the incident should not be introduced because it did not involve the use or attempted use of force or violence, a precondition to its admission under the California Penal Code § 190.3. Petitioner argues that the prosecutor misrepresented to the trial court that Petitioner was found naked in the apartment, which implied intent to rape. He claims the evidence did not support charges of burglary with intent to assault with a deadly weapon, as the apartment was empty when entered and the found knife was not conclusively linked to Petitioner, or of burglary with intent to rape, as the only evidence of that was the fact that Petitioner entered a woman's apartment. He argues that, since there was no evidence of force or the threat thereof, the uncharged crime should not have been presented to the jury. Petitioner argues this violated his Eighth Amendment Rights and his rights to due process and to a fair trial. This Court will not revisit the state court's determination that the admission of the evidence was proper under the state criminal code, Clair, 2 Cal 4th at 676-677, in order to create a Federal Constitutional claim.

Petitioner also raises a Federal issue here, claiming that his Miranda rights were violated by his questioning by the investigating officer while inside the apartment. Respondent argues that Petitioner was undergoing a temporary detention for investigation that did not amount to custody, under Berkemer v. McCarthy, 468 U.S. 420 (1984).

Petitioner opposes this, noting that he was questioned by an officer who faced him with gun drawn, which removes it from the "comparatively nonthreatening character" of traffic stops intended by the Berkemer decision, Berkemer, 468 US at 440. The Court agrees that the questioning more closely resembled a custodial situation than an inquiry, but finds that any error regarding the questioning was harmless. Petitioner essentially admitted the burglary in response to questioning after the administration of the Miranda warnings. The statements to the arresting officer claiming that he had permission to be in the apartment and that Murline Owens was his girlfriend were unremarkable and cannot be said to have a "substantial" effect upon the verdict or the jury's consideration of the case, Brecht v. Abrahamson, 507 U.S, 619, 623 (1993). This claim must be denied.

Z. Claim XXVII- Introduction of the Louisiana Rape Allegation

This Court has found that part B of this claim is procedurally barred from review, Order of August 22, 1997. The remainder of the subclaims within this section center on the use of an arrest warrant on rape charges to impeach the testimony of Dwana Paul, Petitioner's friend. After testifying to his good character, she was asked whether she was aware of the warrant. Petitioner argues that the allegation improperly brought the charge before the jury to consider as an aggravating factor, noting that the prosecution had originally sought to introduce it in its case in aggravation but withdrew the attempt because they could not prove the crime. He states it was improper impeachment material for a witness who was only pleading for mercy for the defendant, and that it was unduly prejudicial. He argues that she was not giving character evidence. The Court

does not agree, RT 2411, and finds that the questioning was not improper, nor was it unduly prejudicial. Although the crime was not proved, the issuance of a warrant is in itself significant, the trial court read a cautioning instruction to the jury not to infer truth of the charge before its admission, RT 2428, and the witness admitted that she was aware of the allegation of the crime, RT 2430. These factors ameliorate any unfairness to Petitioner. The mention of the allegation in the question itself was brief, unspectacular, and immediately resolved. The Court denies the claim, finding no violation of the Petitioner's Constitutional rights.

AA. Claim XXVIII- Prosecutorial Misconduct on Closing Argument

This Claim was found to be procedurally barred from review, Order of August 22, 1997.

BB. Claim XXIX- Revival of the Rape Charge in Aggravation

Having found against the special circumstance of murder committed during attempted rape, Petitioner argues that the jury was again asked by the prosecutor to consider whether Petitioner attempted to rape Rodgers as an aggravating circumstance in the penalty phase. Petitioner claims that this violated his rights to a fair trial and placed him in jeopardy a second time. He bases this on a page of argument within the closing argument in the penalty phase, RT 2479. Petitioner does not cite any specific language, but it appears to be the following:

> Why did Mr. Clair, a person with emotions that these witnesses testified to, do what he did to Miss Rodgers? What was it that released this animal from inside him that painted that picture in that bedroom? What was it that Mrs. [sic] Rodgers didn't do

> or that Mrs. Rodgers wouldn't give him that he wanted? Or even if she did give him, he still had to kill her?

This passage does not raise the rape issue. Amore proper reading is that the prosecutor was decrying the senselessness of the murder. Accordingly, relief must be denied on this claim.

CC. Claim XXX- Improper Ex Parte Communications

As noted above, the Court has found no showing to support a claim of ex parte communications between the trial judge and the prosecutor. The claim is denied.

DD. Claim XXXI- Inadequate Assistance of Counsel in the Penalty Phase

The same analysis applies to inadequate assistance of counsel claims at the penalty phase of the trial as for such claims in the guilt phase. Accordingly, the Court will apply the same standards and analysis as discussed in Claim XX, supra. This claim was also the subject of an evidentiary hearing, at which time Petitioner mainly presented evidence on sub-claims D, E, and F: neglect of evidence of Petitioner's childhood, Petitioner's possible mental illness and substance abuse, and the effect of Petitioner's experiences in the Louisiana State Penitentiary at Angola.

Petitioner argues in his FAP and Traverse that his counsel was derelict in that he neglected to investigate the constitutionality of the 1975 Louisiana robbery plea. As discussed above regarding Claim XXIV, there is no effective attack that has or can be made on that conviction. The Court finds no inadequate assistance in that regard, and no prejudice to Petitioner.

Petitioner charges that his counsel rendered deficient performance by waiving presentation of an

opening statement at trial, following the waiver of an opening statement by the prosecutor. Petitioner argues that this shows that his counsel was unprepared for the penalty phase. However, the waiver of an opening statement, without more, is insufficient basis for a claim of inadequate assistance of counsel, United States v. Rodriguez-Ramirez, 777 F.2d 454, 458 (9th Cir.1985), Stewart v. LaGrand, 133 F3d 1253, 1275 (9th Cir. 1998).

Petitioner next argues in his supplemental briefing that counsel rendered deficient performance in his investigation and presentation of mitigating evidence. He presented as evidence a statement by Bailey in which he characterized his investigation as inadequate. In summary, Petitioner here put on evidence through family members, friends, and expert witnesses who testified to abuse and injuries he suffered through his childhood. Petitioner was neglected and mistreated as an infant, often lacking clean clothes and food. Petitioner's care passed from his frequently- absent mother to his grandmother and his Uncle Jack Clair because of hem neglect. As he grew, he was beaten, frequently and without reason. Jack Clair beat, whipped, and violently manhandled Petitioner as a youth. Some members of Petitioner's extended family acquired legendary status within the family for violence or cruelty, and Petitioner suffered at their hands.

Respondent objects to this evidence, complaining that much of the family information reported in the testimony of the social historian, Dr. June Madden Clausen, is hearsay which she did not attempt to verify, conspicuously absent from or lacking corroboration in other statements by witnesses, or is inherently unbelievable, such as an assertion by one witness that he was working over 100 hours per week. She notes also that these stories

were repressed or withheld until the start of habeas proceedings. She notes that Sandberg testified at the hearing that he interviewed some of these witnesses without uncovering the details they now give. In addition, Petitioner did not disclose such evidence of abuse, and instead presented the view that he had had a good home life.

The Court does not excuse defense counsel's failure to discover mitigating evidence of childhood abuse because Petitioner and his family were not forthcoming with or affirmatively hid such evidence, Rompilla v. Beard, ___ U.S. ___, slip op. at 5-6, 2005 WL 1421390 (June 20, 2005). In his testimony at the hearing, Bailey did not defend his failure to pursue such evidence as a strategic choice. It remains for the Court to consider the prejudicial impact of this testimony at the completion of its review of the inadequate assistance of counsel claim.

Petitioner also argues that his counsel failed to investigate and present mitigating evidence that he suffered from mental illness. He cites evidence tending to show that his family had a history of mental problems, that he suffered from depression upon his mother's remarriage to Bubba Gladden, and that his history of abuse at the hands of family members and at the Louisiana State Penitentiary at Angola caused Dr. June Madden Clausen to find that he suffered from Post- Traumatic Stress Disorder. He twice received psychological treatment; once as a teenager and once following his release from Angola Penitentiary.

Respondent notes that Bailey did retain Psychologist Martha Rogers to conduct a psychological examination of Petitioner and received a negative opinion from her as to the likelihood of finding mental factors that could be introduced in mitigation. Petitioner disputes that characterization,

noting that Martha Rogers testified at the hearing that she was not hired for that purpose, but for guilt phase issues. He notes that she was employed for 12.5 hours and met once with Petitioner. In addition, the only materials about Petitioner she was provided were police reports.

Counsel did not fulfill his responsibility to Petitioner on the issue of investigating and presenting mental health testimony simply by retaining Dr. Martha Rogers, given the brief time she spent with him, Jennings v. Woodford, 290 F.3d 1006, 1013 (9th Cir. 2002), and the lack of information provided on Petitioner and his background. Counsel has an obligation to give a mental health expert information and records available to him sufficient to allow the expert to reach a reliable conclusion, even if they were not specifically requested, Caro v. Calderon, 165 F.3d 1223, 1226 (9th Cir 1999). Again, in his testimony at the hearing, Bailey did not defend his failure to pursue such evidence as a strategic choice. The Court must consider the prejudicial impact of this testimony.

Petitioner argues that his counsel was deficient in failing to present evidence of his substance abuse and addictions. He argues that he has a family history of abuse of alcohol and substances, predisposing him to addiction. He had scotch added to his milk as an infant, and begin drinking on his own at eight or nine years of age. He drank regularly at a bar managed by the family. Petitioner reports having abused a variety of street drugs as a teenager, and suffered from intoxication from drink, pills and inhalants when he committed the 1976 robbery. He reports using hard drugs following his release from the penitentiary. His substance abuse increased as his life spiraled downwards, and continued until his arrest for the Rogers murder.

Respondent counters with evidence diminishing or downplaying the effect of substance abuse on Petitioner's life, citing reports by Sandberg where friends and relatives portrayed him as a casual drinker and an abstainer from hard drugs. She notes also that Petitioner has no record of arrest for use or possession of drugs or for public intoxication. Respondent infers Petitioner is shading his history of substance abuse for the habeas process.

Neither Petitioner nor Respondent specifically discuss whether Bailey was deficient in his duty to investigate Petitioner's use of substances, apparently relying upon their discussion of his practices in the sections dealing with Petitioner's childhood and mental conditions. The Court assumes that counsel did omit such potential mitigating evidence and that there is no claim this was done for any strategic purpose. Accordingly, The Court will consider its prejudicial impact in combination with the rest of the relevant material.

Petitioner argues that information about Petitioner's stay in the Louisiana State Penitentiary at Angola would have had a mitigating effect if presented to the jury. That penitentiary has since become infamous as an example of the horrors of prison life. Violence by guards and prisoners and among prisoners was frequent, often horrific, and unchecked. Petitioner has presented testimony through other prisoners and employees of the prison that he suffered trauma during his stay in the prison, from physical and sexual abuse. The Court, respecting Petitioner's wishes, will not repeat here the specific allegations he has made, nor will it repeat the State's responses thereto.

Bailey was aware that Petitioner had served time at the Louisiana State Penitentiary at Angola, and Sandberg testified that he was aware Petitioner

had suffered "some sort of physical or sexual abuse while he was incarcerated at Angola." However, no further investigation or inquiry was -conducted. Respondent argues that this failure to follow up was excusable because Petitioner was not forthcoming with further details and people interviewed by Sandberg reported mixed or positive things about Petitioner's character and attitude upon his release from prison. But, that was not adequate. There was sufficient evidence of trauma before counsel and his investigator that some direct follow-up on the prison stay should have been attempted, if only to obtain Petitioner's Angola file. Information in that file disclosed elements of abuse suffered in prison, and would have informed counsel's decision whether to present such evidence. Although the process of obtaining the file was apparently initiated by Sandberg, it was left uncompleted by counsel. This was deficient. Again, as there is no claim that the neglect was based upon a strategic reason, the Court will consider the prejudicial impact of the neglect of this evidence.

To consider the question of prejudice from counsel's deficient performance in these areas, the Court must compare the case made in mitigation in these areas to the case that could have been made if not for the deficiencies, Murtishaw v. Woodford, 255 F.3d 926, 940 (9th Cir. 2001). Petitioner must show "a reasonable probability that, absent [counsel's errors], the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. Petitioner states that the childhood evidence that was presented to the jury in mitigation was that his father had abandoned the family before he was born and that he suffered beatings by his uncle Jack Clair after he turned 11 or 12. The

evidence of mental illness presented at trial was Petitioner's mother's statement that she took him to a psychologist after his display of depression and that he appeared "very nervous" after his release from the Louisiana State Penitentiary at Angola. No evidence was presented regarding his substance abuse. No further evidence was presented about Petitioner's stay at Angola other than the fact of his incarceration and that his mother visited him in prison. A fuller presentation could have been made. However, the Court concludes that the neglected mitigation evidence, in itself, is insufficient to merit reversal.

The clear line of authority in this Circuit is toward a generous view of the possible impact of neglected mitigating evidence, particularly as related to childhood abuse and mental defects, Jackson v. Calderon, 211 F.3d 1148 (9th Cir 2000); Ainsworth v. Woodford, 268 F.3d 868 (9th Cir 2001); Silva-v. Woodford, 279 F.3d 825 (9th Cir. 2002); Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002); Caris v. Calderon, 283 F.3d 1117 (9th Cir 2002); Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002); Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003); Boyde v. Brown, 404 F.3d 1159 (2005). Ultimately, this Court must determine whether it believes a reasonable probability of a different verdict exists. The Court concludes it does not.

The abuse Petitioner suffered does not rise to the horrific levels of constant deprivation, violence, fear, and molestation present in cases where relief has been granted. Although he was neglected as an infant, he survived those times and appears to have had a moderately acceptable upbringing until approximately his immediate preteen years. His abuse from that time was lamentable, but does not appear to the Court likely to bring him meaningful sympathy or understanding under the facts of this

crime. Likewise, his childhood self-medication with alcohol and drugs was unfortunate but unremarkable.

Petitioner's poor mental condition does not reach such a severe level as would substantially incline a jury to sympathy on that basis. Compared to the petitioners in the cases cited above where relief was granted, Petitioner has extremely mild mental problems. Petitioner's strongest and most credible argument about his mental condition is based on the report that a San Quentin psychiatrist found evidence of organic brain dysfunction from his performance in a Bender Gestalt test. A dysfunction is less than a disorder, disease, or defect. Although the Court takes the offered diagnosis of Post-Traumatic Stress Disorder seriously, Petitioner's overall mental condition falls short of mental disease or defect likely to engender significant sympathy.

Petitioner's voluntary use of street drugs and alcohol acts as a two-edged sword in presentation to the jury. "Jurors are unlikely to favor defenses based upon abuse of dangerous chugs in evaluating a defendant's culpability for violent behavior," Mayfield v. Woodford, 270 F.3d 915, 931 n. 17 (9th Cir. 2001). Unlike some cases where relief has been granted, Petitioner does not suffer from clear addiction to debilitating substances, such a PCP, methamphetamine, or inhalants.[FN12] Petitioner had a garden-variety substance problem. Although he found himself at the time of the murder to be a homeless transient, he coped with his existence fairly well. Petitioner would gain little sympathy from introduction of evidence of his abuse of various substances.

FN12. Although Petitioner has alleged inhalant use, he has not argued that it was

chronic, nor has he shown the markers of organic brain damage that occur from extended use.

Finally, the Court determines that presentation of evidence of horrors witnessed or perpetrated upon Petitioner during his stay in the Louisiana State Penitentiary at Angola would have little effect in mitigation. Respondent notes that the records and memories of that time do not consistently portray Petitioner as only a victim of violence. Even if Petitioner were blameless in his conduct at the prison, jurors would not be materially moved to sympathy for Petitioner based upon what he suffered in those years. While prison abuse is inexcusable, the reserve of empathy for prisoners is shallow. Given the intervening time between his stay in that prison and the Rodgers murder, the jury would further discount his experience there.

Reweighing all the available mitigating evidence against the evidence in aggravation, Wiggins v. Smith, 539 U.S. 510, 524 (2003), the Court finds that the mitigating evidence has not significantly increased in weight or power, and would not affect the jury's verdict. Accordingly, the Court does not find that the failure to present additional mitigating evidence, by itself, constitutes ineffective assistance of counsel.

Petitioner further claims that his counsel was derelict in that he neglected to investigate and present mental state defenses. As discussed immediately above regarding mitigating evidence of Petitioner's mental state, Petitioner's personal history of mental problems and that of his family amount to little. Although there is sufficient basis to find inadequate assistance of counsel in regard to his failure to pursue the matter, the lack of significant material which could have been discovered leads the Court to find no prejudice to Petitioner.

Petitioner also argues ineffective assistance of counsel if his counsel failed to preserve his objection to the prosecutor's alleged Griffin misconduct in closing argument. Having decided above that such objections were unavailing, the Court would not find counsel ineffective for failing to preserve them. Petitioner also argues that counsel failed to object to racial comments in closing argument, where the prosecutor told the all-white jury not to "bend over backwards" or "overcompensate" for prejudices they might harbor, RT 2482. The comment was followed by a statement that Petitioner deserved "no better or worse judgement than a man of any other color." The Court finds that any misconduct in that statement was harmless, and that Counsel was not ineffective for failing to object to it. Petitioner also criticizes Bailey for failing to object at a point in the transcript where it appears that the prosecutor twice used "proof" for "prove" in paraphrasing Petitioner, RT 2485-2486. If it happened as appears in the trial transcript, it would have reflected badly on the prosecutor, but would not have harmed Petitioner.

Petitioner argues that counsel was derelict in failing to object to closing argument that amounted to victim-impact argument, which he says enabled the prosecutor to bolster an otherwise weak aggravation case. In that section, the prosecutor referred to the victim's youth, her mild disability, and her young daughter. He contends that the argument violated Booth v. Maryland, 482 U.S. 496 (1987), in that it moved the focus of the sentencing jury from Petitioner to irrelevant and inflammatory factors. The Court disagrees. Those statements were part of the context and circumstance of the crime, and were a minor part of the prosecution's penalty phase closing. Not finding the statement material, the

Court does not find counsel ineffective for failing to preserve an objection.

Petitioner argues that counsel rendered ineffective assistance by failing to object to a "revival" of a rape theme in the closing argument, arguing that the prosecutor made comments that implied Petitioner was guilty of a pattern of rape. Respondent argues, and the Court agrees, that Petitioner is reading a rape theme into comments about Petitioner tending to "prey" on women. Petitioner's robbery victims were women, the Owens intrusion was directed at a woman's residence, and he killed a woman. Rape was not a present or necessary element in the prosecutor's argument. The Court does not find deficient performance.

Petitioner contends that counsel was ineffective for failing to object to statements in closing argument that he depicts as misstating facts. The statements were caricature or hyperbole, and were not misrepresentations of the facts before the jury. Not finding the statements objectionable, the Court does not find counsel ineffective for failing to preserve objections.

The next assignment of error and dereliction arises from counsel's failure to object to the prosecutor's comparison of Petitioner to a hypothetical upstanding defendant who would better merit mercy. Petitioner argues that the good qualities of this hypothetical were in fact impermissible aggravating factors because he lacked those characteristics. A prosecutor's rhetorical use of examples is shown nowhere to have been held to deprive a defendant of his right to an individualized sentencing. Accordingly, Petitioner's argument is unavailing, and the Court will not find counsel ineffective on this basis.

Petitioner claims his counsel rendered ineffective assistance by failing to object to argument by the prosecutor which he views as implying that mitigating evidence would have to "excuse" the crime. Again, the Court finds that the continued denial by the prosecution that any mitigating evidence existed would be recognized by the jury as a rhetorical device. Not finding the statement likely to have the effect argued by Petitioner, the Court does not find counsel ineffective for failing to preserve an objection.

Petitioner next charges that his counsel was deficient because he failed to request jury instructions on the lesser included offense of trespass in relation to the "Owens Incident," failed to object to the jury instruction related to the incident that referenced intent to assault with a deadly weapon or intent to rape, failed to request a clarifying instruction regarding the circumstances of the murder, and failed to request a clarifying instruction that jurors could assume a life sentence without the possibility of parole would be carried out. Although Petitioner might have been in a slightly better position had those instructions been delivered to the jury, the Court finds that there was no significant prejudice[FN13] to him by their omission.

> FN13. The Court need not evaluate counsel's performance before disposing of this claim:
>
> > [T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's

> performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Strickland, 466 U.S. at 697.

Petitioner argues that his counsel was ineffective for failing to object to ex parte communications between the prosecutor and the trial judge. As noted above, there is no proof of such communications. In addition, at the evidentiary hearing, Bailey was asked about whether he received a note informing him of such communications, and he stated that he did not recall receiving such a note and that he believed he would have remembered if such an event had taken place. Accordingly, the Court finds no deficient performance.

Reviewing the whole of the allegations made against defense counsel in relation to his performance in the penalty phase of trial, it cannot be said that he "made errors so serious that [he] was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," Strickland, 466 U.S. at 687. Accordingly, the Court denies relief on this claim.

EE. Claim XXXII- Receipt by Jury of Extrinsic Information

Petitioner states that the jury deliberations were tainted because the jurors discussed whether Petitioner could return to the streets despite a life

sentence, and claims their verdict was based in part on the belief that life without the possibility of parole did not foreclose the possibility that Petitioner could be released. Assuming that such talk among jurors amounts to the receipt of extrinsic evidence so as to remove the barrier to review of jury deliberations, McDowell v. Calderon, 107 F.3d at 1367-1368; Federal Rules of Evidence 606 (b), the Court finds that the trial court's cautionary instruction not to speculate about the sentence was sufficient to remove any serious possibility of such remarks or "unexpressed assumptions" affecting the fairness of the verdict, Grotemeyer v. Hickman, 393 F.3d 871, 880 (9th Cir. 2004).

In addition, he claims juror Elise Tower, a one-time law student, used her specialized knowledge to interpret "mitigating circumstances" for the jury and expressed her opinion that anyone who had served time at the Angola penitentiary could not be rehabilitated. There is no corroboration Tower's opinion carried weight with the other jurors. No other juror reports being compelled to follow Tower's instructions rather than those of the trial judge. No evidence exists that any juror took her statements as extrinsic evidence, rather than simply another juror's opinion. The Court finds no reasonable possibility that Tower's opinion could have improperly affected the verdict, United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979). Relief cannot be granted on this claim.

FF. Claim XXXIII- Improper Admission of Prejudicial Photographs

As established in the discussion of Claim XV, the admission of the .crime scene photographs was not erroneous, and the Court does not find that any different standard applies to their consideration at

the penalty phase than. during the guilt phase. This claim is denied.

GG. Claim XXXIV- Instructional Error

Petitioner's claims of -error in the instructions dealing with trespass and assault with a deadly weapon or intent to rape in connection with the "Owens Incident" and as to the meaning of life without parole are denied on the same basis as set forth in the discussion in Section XXXI, supra. Similar attacks on CALJIC 8.84.1 and 8.84.2 as made here by Petitioner have been rejected by the Courts, Boyde, 494 U.S. at 377 (1990); Allen v. Woodford, 395 F.3d 979 (9th Cir. 2005); Mayfield, 270 F.3d at 924. Finally, Petitioner urges the Court to examine juror declarations to find that the trial court should have sua sponte informed the jurors that they could "assume a sentence of life without the possibility of parole means what it says." Such inquiry into juror deliberations is improper. McDowell, supra. Taken with the entire body of instructions, the Court finds the challenged instructions proper and the suggested instructions unnecessary.

HH. Claim XXXV- Trial Court's Refusal to Modify Verdict

This Court will not review the state court's decision-making process in connection with Petitioner's application for modification of the verdict absent appropriate allegations of violation of Federal Constitutional rights. "Federal courts are not forums in which to relitigate state trials." Barefoot v. Estelle, 463 U.S. 880, 887 (1983). The Court has reviewed Petitioner's contentions and the response of the California Supreme Court, Clair, 2 Cal 4th at 689-690, and finds itself in agreement with the reasoning stated there. The claim for relief is denied.

II- Claims XXXVI to XLII

The claims referenced here are general objections to the charging process and administration of the death penalty in the state of California, and were presented without meaningful supporting case law. Such claims are "boilerplate," and have consistently been rejected elsewhere. Because they bear little relation to the particular facts of Petitioner's case, they will not be discussed. The Court has read and considered these claims, but is unconvinced to create precedent by ranting them.

XXXVI-.Petitioner's Death Sentence Serves no Valid State Purpose

XXXVII- Imposition of Death Sentence Racially Discriminatory

XXXVIII- Imposition of Death Sentence Discriminatory on Gender Basis

XXXIX- Failure to Narrow Class of Death-Eligible Defendants

XL- Unconstitutionality of 1978 Capital Sentencing Statute

XLI- Execution by Lethal Gas Cruel and Unusual

XLII- Execution by Lethal Injection Cruel and Unusual

These claims are denied.

JJ- Cumulative Effect of Constitutional Violations

Petitioner urges the court to find that the cumulative effect of minor constitutional errors has deprived him of his constitutional rights to due process, equal protection, a fair trial, and to a reliable sentence. Although the claim is cognizable, the Court does not find that such deprivation has taken place. Williams v. Woodford, 384 F.3d 567, 614 (9th Cir. 2004)

KK- Claims XLIV- XLV: Post-Conviction Claims

As the Ninth Circuit has explained many times, "federal habeas relief is not available to redress alleged procedural errors in state post-conviction proceedings," Ortiz v. Stewart, 149 F.3d 923, 939 (9th Cir. 1998); Gerlaugh v. Stewart, 129 F.3d 1027, 1044 (9th Cir. 1997); Villafuerte v. Stewart, 111 F.3d 616, 632 n.7 (9th Cir. 1997); Franzen v. Brinkman, 877 F.2d 26,26 (9th Cir. 1989) (per curiam). Although a claimed violation of the Equal Protection Clause in state post-conviction proceedings may be addressable in a federal habeas corpus proceeding, see, e.g., Lane v. Brown, 372 U.S. 477, 482-85 (1963), claims such as Petitioner's cursory assertion that the state court's refusal to grant him "timely and sufficient" funding violated his constitutional rights fails to state facts that point to a real possibility of constitutional error, Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977); James v. Borg, 24 F.3d 20, 26 (9th Cir.1994). Accordingly, the Court denies these claims.

LL. Claim XLVI- Destruction of Records by Orange County District Attorney

This claim is not cognizable in Federal habeas corpus review. To the extent that it is argued to state a Brady claim, it should have been presented as such in the body of the petition. The Court cannot grant relief on claims unrelated to constitutional issues at trial, and, as the FAP and Traverse thereto promised that this claim would be supplemented following funding and discovery and it has not been so augmented, the Court determines that this claim has been abandoned and denies relief.

MM. Claim XLVII- Effective Assistance of Appellate and Habeas Counsel

Petitioner claims that he was denied effective assistance of counsel in his direct appeal and subsequent habeas proceedings. No prejudice to Petitioner has been shown resulting from any alleged

acts of inadequate assistance of counsel. The Court notes that this claim, too, was to be supplemented and has not been. As a result, the Court determines that this claim has also been abandoned and denies relief.

IV. Disposition

The Court **DENIES** all relief requested in the First Amended Petition.

V. Certificate of Appealability

The issuance of a Certificate of Appealability requires a showing that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 US. 473, 484 (2000). Given the expansive character of the definition of inadequate assistance of counsel in connection with the failure to develop and present mitigating evidence, this Court finds that reasonable jurists could find its assessment of Claim XXXI debatable, and concludes that a certificate of appealability should issue on the claim. On the Court's own motion, a Certificate of Appealability is **GRANTED** on that claim and **DENIED** as to all other claims.

VI. Stay of Execution

Pursuant to Local Rule 83-17.6 (b), the Stay of Execution in this case shall continue until the Court of Appeals acts upon the appeal or the order of stay.

IT IS SO ORDERED.

Dated: June 30, 2005

/s/ Gary. L. Taylor
Gary L. Taylor
United States District Judge

18 U.S.C. § 3006A
(Excerpts)

§ 3006A. Adequate representation of defendants

(a) Choice of plan.--Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:

(1) Representation shall be provided for any financially eligible person who--

(A) is charged with a felony or a Class A misdemeanor;

(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;

(C) is charged with a violation of probation;

(D) is under arrest, when such representation is required by law;

(E) is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;

(F) is subject to a mental condition hearing under chapter 313 of this title;

(G) is in custody as a material witness;

(H) is entitled to appointment of counsel under the sixth amendment to the Constitution;

(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel; or

(J) is entitled to the appointment of counsel under section 4109 of this title.

(2) Whenever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who--

(A) is charged with a Class B or C misdemeanor, or an infraction for which a sentence to confinement is authorized; or

(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

....

(c) Duration and substitution of appointments.--A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate judge or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate judge or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate judge or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

....

18 U.S.C. § 3599
(Excerpts)

§ 3599. Counsel for financially unable defendants

(a)(1) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either--

(A) before judgment; or

(B) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(2) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).

(b) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(c) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(d) With respect to subsections (b) and (c), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(e) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(f) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under subsection (g). No ex parte proceeding, communication, or request may be considered

pursuant to this section unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

....

28 U.S.C. § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the

Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with

respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able,

shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

OPPOSITION BRIEF

No. 10-1265

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL MARTEL,

Petitioner

v.

KENNETH CLAIR,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John R Grele*
CA State Bar No. 167080
149 Natoma St., 3rd Floor
San Francisco, CA 94105
Tel: 415-348-9300
Fax: 415-348-0364
email: jgrele@earthlink.net
* *Counsel of Record*

David W. Fermino
CA State Bar No. 154131
268 Bush St #2914
San Francisco, CA 94104
Tel: 415-568-7550
Fax: 415-765-1565
Email: ferminolaw@gmail.com

CAPITAL CASE

INTRODUCTORY STATEMENT

This is a unique pre-AEDPA case with an extremely complicated procedural history marred by state suppression of evidence during post-conviction, counsel conflicts and a District Court ruling that prevented review of that evidence. Once that evidence was finally tested by the state, late in the appellate process, newly-obtained DNA results exclude this death row prisoner. Other late-discovered evidence shows Clair was a suspect in, and exonerated of, a similar nearby homicide the night before the capital murder, and fingerprints that were not Clair's were found on items with potential evidentiary value, contrary to a trial stipulation induced by the prosecutor's representations.

The effort by Petitioner in the courts below and repeated here is to maneuver Mr. Clair's claims relating to the withheld evidence into a successor posture, one subject to the restrictions of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Mr. Clair's efforts have been dedicated to having his one fair bite at the apple, and to be able to discover and litigate his first habeas petition with access to all the evidence that may afford him relief.

In support of its efforts, Petitioner misstates salient facts and omits others (such as the state's suppression of evidence and the DNA results) in an attempt to make this case appear worthy of this Court's certiorari jurisdiction. It is not.

Mr. Clair Kenneth Clair has maintained his innocence throughout. The state's theory at trial was that a sexual assault had been committed on the victim, based on the evidence at the scene and the condition of the victim. Eye-witnesses, including a five-year-old boy, repeatedly stated it was not Mr. Clair who committed the crime, including at an in-court pretrial hearing, but they were never called to testify at trial. During post-conviction proceedings, Mr. Clair's

counsel requested examination of the physical evidence, only to be told by the state that it did not exist. Mr. Clair then secured donations and hired a private investigator who found the physical evidence. Mr. Clair alerted the District Court to the newly-discovered evidence, requested it be examined and DNA tested, and moved for new counsel for that purpose. The District Court denied that application without any inquiry, then denied all claims in his petition.

The court below appointed new counsel, who sought to reopen proceedings first through motions under Rule 60(b), discovery and for expert resources. These were denied. After that denial, the *state* then tested the evidence. The results, announced during the pendency of circuit proceedings, were astonishing – Mr. Clair's DNA was not on the victim's vaginal swabs; but another male's was. He has remained on death row for over three years since this discovery without any hearing on the evidence.

It was in this context that the court below ruled, prudently, that Mr. Clair should have had his day in court before a fact-finder who could evaluate all the evidence he long ago sought but was denied him through no fault of his, and determine whether it merits relief. This ruling, a simple evaluation of the facts below and those developed during appellate proceedings, is an unremarkable determination that the District Court abused its discretion in not making any inquiry into the serious allegations he raised prior to judgment. The decision recognizes that the state should not benefit from denying access to evidence for nearly fifteen (15) years, and that Mr. Clair cannot be faulted for insisting upon counsel that would investigate his case once that evidence was uncovered. The decision merely puts the parties in the position they should have been all along – with his rights to review intact and before a fact-finder who can hear evidence and make a fair determination of the merits without being tainted by state suppression and counsel inaction.

Neither the facts nor state of the law require this Court's intervention. The interlocutory nature further underscores the fact that the interests of justice would best be served by allowing the federal district court to resolve the issues presented by this complex case. There is simply no reason for this Court to review the Ninth Circuit's fact-bound and faithful application of traditional concepts of abuse of discretion.

TABLE OF CONTENTS

INTRODUCTORY STATEMENT 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

RELEVANT STATUTES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 5

A. The Prosecution Case 5

B. The Defense Case 9

C. Guilt Phase Evidence Not Heard by the Jury 9

REASONS FOR DENYING PETITION 11

I. The Ninth Circuit's Unpublished Order Below Represents A Straightforward and Unsurprising Application of Abuse Discretion Standards 12

II. The Writ Should Not Issue Given the Interlocutory Nature of the Panel's Decision 17

III. The Rule 60 (b) Proceedings and the Secret Evidence Allegations are a Red Herring 19

CONCLUSION 21

TABLE OF AUTHORITIES

FEDERAL CASES

American Construction Co. v. Jacksonville, Tampa & Key W.RailwayCo., 148 U.S. 372 (1893) 18

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 16

Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621 (1977) 14

Brotherhood of Locomotive Firemen v. Bangor & Aroostock .R.R. Co., 389 U.S. 327 (1967) 19

Conte v. General Housewares Corp., 215 F.3d 628 (6th Cir.2000) 16

Cooter & Gell, 496 U.S. 384 (1990) 15

Estelle v. Gamble, 429 U.S. 97 (1976) 18

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916) 18

Harris v. Nelson, 394 U.S. 286 (1969) 14

Pace v. DiGuglielmo, 544 U.S. 408 (2005) 4

Savic v. United States, 918 F.2d 696 (7th Cir.1990) 16

United States v. Hinkson, 585 F.3d 1247 (9th. 2009) 15

United States v. Jacquinot, 258 F.3d 423 (5th Cir.2001) 16

United States v. Virginia, 518 U.S. 515 (1996) 18

Virginia Military Institute v. United States, 508 U.S. 946 (1993) 18

STATE CASES

People v. Clair, 828 P.2d 705 (Cal. 1992) 2

STATUTES

28 U.S.C. §1[illegible] 1

28 U.S.C. §2244 1

18 U.S.C. §3006 ..... 1, 11, 16

18 U.S.C. §3599 1

OPINIONS BELOW

The decision of the District Court denying Mr. Clair's request for counsel to investigate the evidence is located at ER 69-73.[1] The District Court order denying habeas relief, and the Memorandum Decision of the Ninth Circuit vacating and remanding for further proceedings are unreported. Each is reproduced in Petitioner's Appendix to the Petition (Pet. APP), at 21-92 (District Court order denying relief) and at 1-6 (Court of Appeal Memorandum Decision).

JURISDICTIONAL STATEMENT

The Ninth Circuit issued its judgment on November 17, 2010, and denied the State's request for re-hearing and suggestion for re-hearing en banc on January 13, 2011. No judge of the Court voted for rehearing. This Court has jurisdiction over the State's timely certiorari petition under 28 U.S.C. §1254(1).

RELEVANT STATUTES

The relevant portions of the statutes involved in the circuit's decision C 18 U.S.C. §§ 3006A, 3599 C are set out in the Appendix to the Petition. (Pet. APP., at pp. 92-96). However, Petitioner has included incorrect versions of the statutes governing substantive relief under 28 U.S.C. §§ 2244, 2254 (Pet. APP., at pp. 97-102), which is not an issue in this case as relief was not granted or denied. Because Mr. Clair's petition was filed prior to 1996, the AEDPA does not govern and those statutes are inapplicable.

STATEMENT OF THE CASE

Kenneth Clair was arrested on January 23, 1985, for the November 15, 1984, murder of Linda Faye Rodgers. An information was filed charging Mr. Clair with: (1) the murder of Linda Faye Rodgers on November 15, 1984, alleging special circumstances that it was

[1] Throughout "ER" refers to the Excerpts of Record filed in the Court of Appeal.

committed in the course of a burglary, and was committed during an attempted rape; (2) burglary; and (3) a prior burglary on or about November 7, 1984. (ER 2454-56).

On July 28, 1987, a jury found Mr. Clair guilty of murder with the special circumstance of burglary, but found the attempted rape special circumstance not true. (ER 3230B3232). On August 6, 1987, the jury sentenced Mr. Clair to death. (ER 3395). On December 4, 1987, the trial court sentenced Mr. Clair to death. (ER 2460-70).

Clair's appeal was denied by the California Supreme Court. *People v. Clair*, 828 P.2d 705 (Cal. 1992). His state habeas petition was denied on July 12, 1995. (ER 85).

After the state court ruling, the United States District Court for the Central District of California permitted discovery, heard dispositive motions, and held an evidentiary hearing on certain claims on August 20th and 24, 2004. (Pet. APP., at pp. 21-23). Those claims were trial counsel's failure to call the eyewitnesses who stated it wasn't Mr. Clair who committed the murder; his failure to investigate and present an alibi witness; his admitted failure to investigate and present mitigation evidence in the penalty phase; and juror misconduct. (ER 76-77).

After the evidentiary hearing but before the close of proceedings, and on March 25, 2006, Mr. Clair sought appointment of new counsel to investigate guilt phase claims he alleged had gone unattended by his appointed counsel, including locating and interviewing his alibi witness. (ER 258-60). There had been long-standing difficulties between Mr. Clair and his counsel in this regard. (ER 217-218). After the District Court requested briefing from the parties (ER 257), his counsel agreed to pursue these matters, and Mr. Clair agreed. (ER 256). The court then declined to take any further action. (ER 254).

The case took a new twist when the physical evidence was found by an investigator Mr. Clair hired with donations he solicited. It had been represented by the state for approximately

fifteen (15) years that the physical evidence could no longer be found. (ER 220-221). Mr. Clair then sought his counsel's assistance in testing of that evidence. (ER 218). When his counsel did not pursue it, Mr. Clair alerted the District Court and again sought new counsel in a letter dated June 16, 2005. (ER 70-73). He pointed out that fingerprints had been found that do not match him, the victim or the residents of the home; and, that the Court needed to be alerted to the discovery of the physical evidence and the need for it to be DNA tested. (ER 72). The investigator substantiated this, but his filing was rejected under a local rule prohibiting letters to the court. (ER 243-245). Mr. Clair's application was then denied on June 30, 2005 without any further inquiry by the District Court because it felt counsel was "doing a proper job" and Mr. Clair had not shown a conflict of interest or inadequacy of counsel. (ER 69). A final order denying relief was issued the same day (ER 8-67), and the district judge retired the next day.

Mr. Clair raised his concerns about counsel to the Court of Appeal. Counsel then wrote the court explaining it could no longer represent Mr. Clair. That court then appointed new counsel. (ER 240-241).

On June 30, 2006, Mr. Clair applied to the district court for permission to file a motion under Fed. R. Civ. Pro. 60(b) (Rule 60(b)) for relief from the judgment. The application raised several issues concerning the new evidence, which had yet to be examined, including that the fingerprints appeared to differ from what was represented at trial as to their significance; that the state had not disclosed that a nearby murder committed the day before in a nearby town appeared to be similar in nature to the capital homicide, but was committed while Mr. Clair was incarcerated; and that the evidence contained biological evidence that could be tested. (ER 222-239). The District Court on September 21, 2006 denied Mr. Clair's application to hear the motion. (ER 208-213).

Mr. Clair's Motion to Remand was granted by the Court of Appeal on April 9, 2007, and the District Court was directed to permit a Rule 60(b) motion to be filed and to rule on it. (Pet. APP, at pp. 12-13). Mr. Clair then submitted discovery requests, funding applications for experts, and notified the District Court that the state court was hearing discovery motions and there the state was agreeing to disclose materials. (ER 185-190).[2] However, before the state discovery process could begin, and without any further briefing, on May 21, 2007, the District Court denied Mr. Clair's Rule 60(b) Motion and granted a Certificate of Appealability as to the issues raised by the Motion. (ER 4-7). A Motion for Reconsideration listing the factual development sought by Mr. Clair (ER 170-183), as well as lodging the state court discovery litigation that was then pending (ER 129-169) was denied on June 19, 2007 (ER 1-3). The matter proceeded back to the circuit court. Briefing included a claim that the District Court had abused its discretion in not making inquiry into Mr. Clair's request that counsel have the newly-discovered evidence examined.

As a result of the discovery of DNA evidence obtained by the state's testing during the appellate process that was not Mr. Clair's, on December 19, 2008, Mr. Clair filed a state court petition alleging innocence based on the DNA results, trial court error, prosecutorial suppression of evidence and trial counsel ineffectiveness in failing to investigate innocence. He also filed the same petition on the same day in the Court of Appeal as a placeholder successor petition under *Pace* v. *DiGuglielmo*, 544 U.S. 408, 416 (2005) (Resp. APP, at pp. 31-53), along with a motion (Resp. APP, at pp.1-30), and exhibits (Resp. APP, at pp. 54-235), so as to preserve the issues as against any possible time bar should he later be forced into a successor posture. He advised the Court of Appeal of the discovery of exclusionary DNA evidence in the context of his appeal as

---

[2] In California, the state trial courts can hear limited discovery motions in capital cases while habeas petitions are pending in the state supreme court. *See* Cal. Pen. Code ' 1054.9.

well, and formally requested the facts in the new application be considered when evaluating his appeal. He argued that the appeal should be remanded and he be permitted a chance to include the results of the investigation in a first petition.

In light of the Memorandum decision, the Circuit held that the *Pace* protective petition was moot as was the motion to consider that record in the appeal. (Resp. APP, at pp. 236).

The California Supreme Court has yet to rule on the petition that has been pending before it for two and a half years. State discovery litigation continues, though.

STATEMENT OF THE FACTS

A. The Prosecution Case

Sometime between November 7 and 10, 1984, Margaret Hessling noticed that a coffee was missing from a bedroom closet in the house that she and her husband, Kai Henriksen, were renting in Santa Ana, California. (ER 2641, 2642-43). Also living at their house were Hessling's four children, as well as another adult, Linda Faye Rodgers, and her daughter, Kristy Rogers. (ER 2639). Several other items, including a jar of mustard and a pack of cigarettes, had gone missing from the house sometime before then. (ER 2641). The coffee can contained approximately $400 in bills and $50 in change, as well as several pieces of jewelry she could not recall. (ER 2642, 2726).

Around this time, Mr. Clair was a homeless man who, along with others, occasionally squatted in a vacant house immediately adjacent to the Henriksens. On November 11, 1984, Hessling and Henricksen found the coffee can inside a box in a bathroom in this vacant house. (ER 2643). The coffee can no longer contained any of the money, although it still contained several pieces of jewelry. (ER 2643-44). Hessling and Henricksen also discovered three bags which contained clothing and other indicia of Mr. Clair's ownership. (ER 2720, 2723, 2727, 339, 4124). They took them, along with the coffee can, back to their house. (ER 2727).

They then searched through the bags, (ER 2733), and called the police. (ER 2727). The police arrived, spoke with the Henriksens, and left with the bags. Later that same evening, the police returned. (ER 2734). This time the police entered the vacant house and discovered Mr. Clair, whom the police described as a "transient." (ER 2745; 2396). Mr. Clair was arrested and charged with trespass and possession of stolen property. (ER 2746; 2753; 2396). Four days later, on November 15, 1984, he was released from jail without any formal charges filed against him. (ER 3043).

On the night of November 15, 1984, Linda Faye Rodgers was found dead in the master bedroom of the Henriksen's house. Upon returning home that night, Hessling entered the bedroom to find Rodgers on the bed. (ER 2656-57). She claimed to have realized over the course of the following week that several items were missing, including a blue turquoise ring, one green turquoise ring, a turquoise necklace with coral and silver beads and a silver eagle's head, two necklaces, a blue felt box, a man's ring, and several souvenir saucers. (ER 2677-82). Also missing were a blanket, two car speakers, a six-pack of beer, and a "buck" knife. (ER 2682-86).

Pauline Flores, who was Mr. Clair's girlfriend at the time, was the main prosecution witness against him. Flores acknowledged that from October 30th to November 7, 1984, she was hospitalized for head injuries sustained in an earlier accident. (ER 2779). Without elaborating for the jury, Flores stated that as a result of her injuries, she had to "learn how to speak correctly again and how to walk." (ER 2782). She also acknowledged that she was taking the painkiller Dilantin for her injuries during dates about which she was testifying. *Id.*

Flores came to the attention of the police about six weeks after the Rodgers homicide. She claimed to have met Mr. Clair on several occasions in the week after being released from the

hospital. (ER 2780-82). On the evening of November 15th, Flores claimed that she and several others drank a bottle of whiskey and "bumped into" Mr. Clair outside a liquor store in Santa Ana. (ER 2782, 2786). She left with Clair and the two stopped at several nearby apartments to visit several friends. (ER 2783a-2784). He then asked her to accompany him to get some of his things. (ER 2785). They proceeded to walk to the vacant house where Mr. Clair had been squatting. (ER 2789). Mr. Clair then asked Flores to stand next to nearby tree and to wait for him while he went to retrieve some of his belongings. (ER 2789). Flores waited for twenty minutes and then entered the vacant house. (ER 2791).

Flores claimed that she looked in every room of the house for Mr. Clair. (ER 2792). She left after five minutes and walked down Wilshire Avenue. She next looked for Mr. Clair at a friend's house, then returned, waited, entered the vacant house, left again, waited, then left. (ER 2794-97). As she was walking away, she ran into Mr. Clair. (ER 2798-99).[3] Flores claimed he was carrying two speakers, a light blue floral blanket, and a six-pack of Budweiser in a brown paper bag. (ER 2799).

Mr. Clair claimed that he had gone to a liquor store to get some beer. (ER 2800). When she asked why he had taken so long, Flores claimed that Mr. Clair replied that he had "just finished beating up a woman." (ER 2801).[4] Flores claimed she saw blood on the palm of Mr. Clair's right hand from a scratch, and that when she asked him where it had come from, he told her that he had been "fighting with somebody." (ER 2802). The two walked down the street together, reached a nearby church, sat on the church steps, and talked. (ER 2803-2805). Flores noticed that Mr. Clair had bags and several blankets stashed next to a tree near the church, which

---

[3] The jury was unaware Flores had initially provided a different sequence of these events.

[4] She admitted she was just remembering this statement.

matched the ones seized four days previous. (ER 2806-07). They sat down on the blankets and, according to Flores, Mr. Clair showed her two heart crystal charms, a necklace, a small skillet, a green "velvety" box, a man's "unicorn ring," and a "man's gold tone nugget ring." (ER 2807-2808). They then had sex and fell asleep. (ER 2816).

At trial, the prosecutor used Buckels' carefully crafted reports and extensive (unobjected to) hearsay to establish that Flores offered a description of jewelry, blanket and speakers that had yet to be reported to him by Margaret Hessling as missing, but that Hessling then later verified it. (ER 3043-3047). This was an attempt to bolster Flores' testimony. It backfired somewhat when Hessling disclosed that she had reported these items as missing in a conversation with Buckels shortly after she moved out, which was about a week after the incident. (ER 2681-2683) (listing items noticed missing later, when moved and within a week); (ER 2718); (ER 3009-3011) (statement to Buckels re: missing items when moved out).

Flores then surreptitiously recorded Mr. Clair on January 16, 1985 as he was being released from jail on an unrelated criminal charge. (ER 3057-58). On the tape recording of the conversation and in response to pointed questioning from Flores, Mr. Clair specifically and emphatically denied any involvement in the Rogers murder. (SER 19 ["no I didn't"]; SER 20 ["it's all bullshit"]). Moreover, other statements are, at best, ambiguous.[5] For example, Mr. Clair repeats several times there is no proof of his involvement, so Flores shouldn't worry that she could be charged. (ER 2528-2547). Nonetheless, the prosecution argued to the jury that several statements should be interpreted as admissions of guilt, either by Clair's silence or by his

[5] Clair was not arrested for murder based on these statements. A second surreptitiously-recorded conversation was made, and no incriminating information resulted. (ER 3059).

equivocal responses. (ER 3165-76). None of the jewelry and other items that Flores claimed she observed in Clair's possession on the night of November 15, 1985, was ever recovered.

B. The Defense Case

Trial counsel presented, in essence, no guilt phase evidence. Instead, trial counsel sought merely to challenge the sufficiency of the prosecution's evidence. To that end, he challenged the credibility of the prosecution witnesses and the believability of their testimony, especially with regard to Flores, who had made numerous contradictory statements. (ER 1619-21, 1693-1719, 2055-2058, 2691-2719, 2732-42, 2752-57, 2766-70, 2842, 2958, 2964-96). He argued Flores' recollection of seeing the various items was from one of the recorded previous meetings she had with Mr. Clair and that Buckels had led her into changing her story to match the circumstances of the Rodgers' homicide. (ER 3185-90). Flores also had a psychiatric episode while in the hospital. (ER 3184-85). Trial counsel also argued that Mr. Clair had made no admissions, express or implied, during the surreptitiously recorded conversation on January 16, 1985. (ER 3196-97). In addition, trial counsel pointed to the absence of physical evidence placing Mr. Clair in the Henriksen residence the night Linda Rodgers was killed.

C. Guilt Phase Evidence Not Heard by the Jury

The jury never heard the following evidence, adduced in habeas proceedings:

1. Two eyewitnesses told police that the perpetrator was a white man (Mr. Clair is Black). Five year old Jerrod Hessling and six year old Kimberley Hessling provided accounts of what they saw which were entirely consistent with the evidence at the scene. (ER 2474-75, 2477-79, 2481-83, 1371). Jerrod's ability to distinguish racial characteristics was substantiated by Detective Buckels that night. (ER 2477-80; ER2312). Both were subjected to pressures from their parents and investigators to change their identifications. (ER 2438-39). Kimberley did not waiver in hers. Even though Jerrod did somewhat, when called at the preliminary hearing, he

stated Mr. Clair was not the man he saw that night. (ER 2435-48). Expert analysis would have shown he was clear and credible. (ER 759-793).

2. Kristy Rodgers who was in the house that night, spontaneously exclaimed to the defense investigator "[t]hey have the wrong man. That black man didn't do it." (ER 341-42).

3. Mr. Clair had an alibi witness who stated that although he could not recall the specific night and needed to refresh his recollection (which counsel never attempted), every Thursday evening he and Mr. Clair spent the night playing pool as that was the night he was paid.

4. Margaret Hessling, a key state's witness on the missing items tying Mr. Clair to the homicide (and when they were taken), was facing welfare fraud and perjury charges, had received benefits for her cooperation and testimony because she "had special information", and, according to a memo withheld from the defense, the prosecutor's agents had interceded on her behalf in that case. In the end, she was allowed to plead to a misdemeanor and never repaid the fines. (ER 1430-31; 1433-35).

5. Kai Henricksen, an "important witness" (ER 2627), had previously been charged with murder and plead guilty to manslaughter in the killing of a paraplegic. (ER 2625-29).

6. The Henricksen were involved with drugs and activity observed by neighbors was consistent with drug dealing. (ER 1482-84; ER1469).

7. Neighbors heard screams emanating from the house; Kai had a warrant for assault prior to Rogers' murder (ER 345-46, 1169-71, 1468-74, 1482-87); he and Rodgers had recently argued and he had fought with her; Rodgers expressed fear for her life to her family and Hessling, and was seeking to leave her position as a live-in babysitter and return home as a result.

8. Flores was known as a pathological liar. (ER 346- 49, 381-88). A week before the events to which she testified Flores underwent brain surgery. Nearly all her friends and family were of the opinion that she could not have accurately recalled events from November 15, 1984, only a week after her discharge. (ER 1488-94). Records indicate two days before November 15th, she was suffering from Dilantin toxicity, which has an effect on memory. Combined with the alcohol she admitted consuming, her ability to recall accurately was compromised. (ER 1463-67).

9. The forensic evidence from the scene was such that the perpetrator would have been sprayed with blood, according to a criminalist hired by the defense and the investigating officers. (ER 1367-70; ER 2091-2095). This was contrary to Flores' description that evening of Mr. Clair.

10. Detective Buckels stated to Flores that he had reviewed the tape and that Mr. Clair had only "slightly confessed, slightly. I mean low slightly." (ER 2278, 2282). Flores, who was familiar with Mr. Clair's manner of speech, felt he hadn't admitted anything related to the homicide. *(Id). It* was for this reason that Officer Buckels asked Ms. Flores to try again. (ER 2279).

REASONS FOR DENYING PETITION

This Court will grant a petition for writ of certiorari only for compelling reasons. Supreme Court Rule 10. This case presents no compelling reason. There is no circuit split. The decision of the court below breaks no new ground in the interpretation or application of 18 U.S.C. §§ 3006A (a)(2)(B) and 3559(a), and it does not conflict with any relevant decision of this Court. It is a standard abuse of discretion analysis in a fact-laden case involving late-discovered evidence that should have been considered as part of a first petition. Finally, this Court should deny certiorari due to the interlocutory nature of the present appeal.

I. The Ninth Circuit's Unpublished Order Below Represents A Straightforward and Unsurprising Application of Abuse Discretion Standards

On June 16, 2005, Mr. Clair wrote a letter to the district court, requesting that new counsel be appointed.[6] The district court was aware that Mr. Clair was having trouble with his counsel. The district court had previously received a letter from Mr. Clair alleging a longstanding pattern of inattention to his case. The June 16th letter repeated some of the allegations contained in the previous letter but also included a serious additional allegation: that a private investigator working on Mr. Clair's behalf had located important physical evidence from the crime scene that had never been tested, and that counsel, despite having been informed of the evidence, had made no effort to obtain it, analyze it or present to the court. Mr. Clair's private investigator sent a letter to the district court substantiating Mr. Clair's claims. The district court received and opened the letter, but returned it without filing it citing Local Rule 83-2.11. Following receipt of Mr. Clair's June 16th letter the district court made no inquiry into the truth of Mr. Clair's allegations. The district judge denied Mr. Clair's motion on the same day that he denied Mr. Clair's petition, and then retired the following day.

Years later and long after Mr. Clair's Rule 60(b) motion was denied, the case took yet another twist when the state decided to conduct the DNA testing Mr. Clair had long desired.[7]

---

[6] The facts in this paragraph are as set forth in the opinion of the court below. (Pet. APP., at pp. 1-5).

[7] The facts discussed herein are not part of the appellate record before the Court of Appeal, but were presented to that court and are contained in Respondent's Appendix. This Appendix is mainly the efforts to obtain evidence and the discovery of DNA evidence that occurred *after* the denial of the Rule 60(b) motion and while the matter was on appeal. They were submitted to the appellate court in a second petition for writ of habeas corpus and a motion to file that petition, or for remand. That motion was denied as moot. Nonetheless, they are important facts the Court should consider when evaluating the Petition, and Petitioner makes references to the pleadings, but not the content, in its Petition.

During this time, Mr. Clair had diligently sought discovery and evidence review by way of several state post-conviction discovery motions. (Resp. APP, at pp. 56-64) (detailing efforts and discovery of DNA results). While his investigators were examining evidence, it was orally disclosed that DNA testing had been done and the results were favorable to Mr. Clair. The state produced a report months later detailing that the vaginal swabs taken from the victim contained male DNA not Mr. Clair's. (Resp. APP, at pp. 66-73). As detailed in the exhibits (Resp. APP, at pp. 56-64), still several months and three discovery motions later, and more than a year after the testing had been done, the state disclosed the electronic data generated by the DNA lab that permitted expert review. The state also disclosed that Mr. Clair had been a suspect in the other homicide and that he had long ago been eliminated by DNA testing. At that time, it was believed an afghan was still available that would contain hairs that could be tested. During post-conviction proceedings, that afghan disappeared.

The court below correctly observes that the "physical evidence that Mr. Clair claimed had been located was potentially of great importance to [his] habeas petition." (Pet. App. at p.4). This is because, as the panel correctly found, and which does not appear to be contested by Petitioner, Mr. Clair's conviction was based upon circumstantial evidence. (Pet. App. at p.4). Thus, the panel reasoned, at a minimum, when faced with Mr. Clair's second request for new counsel, the district court was required to ascertain whether the interests of justice required that the request be granted, which demanded some sort of inquiry. (Pet. App. at p.4). The district court's failure to inquire into Mr. Clair's allegations, according to the panel, was an unreasonable application of the law to the facts in front of it, and therefore, an abuse of discretion. (Pet. App. at pp. 4-5).

From this relatively straightforward and simple conclusion Petitioner argues the court below "erroneously inferred from federal appointment of counsel statutes an improbable right to substitute counsel in collateral attacks greater that any constitutional right accorded to criminal defendants in criminal trials." (Brief of Pet at p.10) After misconstruing the panel's opinion, Petitioner then announces that this "improbable right" creates a "roadmap describing a new avenue for frustrating the State's compelling interests in the finality of its capital judgments." (Brief of Pet. at p.10). Nonsense squared.

It cannot possibly be true, as Petitioner argues, that denying the writ of certiorari in this case will create the "roadmap of frustration" thus described. To the contrary, the present case is infected with troubling facts that have frustrated this Court's direction that a habeas petitioner is "entitled to careful consideration and plenary processing of [his] claims, including full opportunity for presentation of the relevant facts." *Harris v. Nelson*, 394 U.S. 286, 298 (1969); see also *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621 (1977) (upholding circuit decision that the District Court abused its discretion when it prevented factual inquiry). These facts are: Petitioner had exculpatory DNA evidence in this case; it hid this evidence for nearly fifteen (15) years; Mr. Clair, a death sentenced inmate, hired a private investigator to find this evidence; and finally that the district court, after receiving notice of this from Mr. Clair, including substantiation from the private detective that the evidence in question existed, ignored the inquiries without any further investigation and refused to grant Mr. Clair's request for new counsel. If anyone has been frustrated, it is Mr. Clair, who has encountered a blistering array of procedural maneuvering and evidence suppression by the state as it desperately clings to an unraveling conviction, while Mr. Clair sits on death row awaiting his one fair shot at review based on all the evidence, evidence that now includes the results from the state's DNA testing.

Petitioner repeatedly faults Mr. Clair for not seeking discovery of the missing evidence or raising claims relating to missing evidence earlier. (Pet. at pp. 5-8). Undoubtedly, Petitioner would have pointed out then that there was no evidence to be found, therefore no discovery could assist Mr. Clair. Petitioner has never averred that the evidence was available for inspection, or denied that Mr. Clair's counsel sought it out and was informed it no longer existed. Petitioner would have habeas applicants repeatedly file motions and seek discovery of evidence believed to have been lost or destroyed, further congesting the courts with what would appear to be baseless litigation. There is no requirement that death row inmates conduct such litigation as a pre-requisite for claims related to late-discovered evidence, nor should there be.

More fundamentally, as the court below correctly finds, Petitioner misperceives Mr. Clair's claim, framing its argument as if Mr. Clair is asserting a claim for ineffective assistance of counsel. Mr. Clair makes no such assertion, nor is any such showing required. Instead, Mr. Clair argues that the district court failed to properly exercise its discretion when it failed to apply, in the words of the court below, the correct "interests of justice" standard or did so in an "implausible, illogical or unreasonable manner" when it made no inquiry or evaluation of the new discovery of the evidence. Thus, as the panel correctly held, the district court abused its discretion, citing *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

Hinkson adopted a two-part test to determine objectively when a district court abuses its discretion in denying a motion for a new trial. *Id.* at 1262. The first step determines de novo whether the trial court identified the correct legal rule to apply to the relief requested. See, *Cooter & Gell*, 496 U.S. 384, 400-401 (1990). The second step determines whether the trial court's application of the correct legal standard was (1) "illogical," (2) "implausible," or (3) without "support in inferences that may be drawn from the facts in the record." *Anderson v. City*

of Bessemer City, N.C., 470 U.S. 564 (1985). The court's test for abuse of discretion review - one that looks to whether the district court used the correct legal principles and whether, if so, it reaches a result that is illogical, implausible, or without support in inferences that may be drawn from the facts in the record - has support in cases from the other circuits. *See e.g., Savic v. United States*, 918 F.2d 696, 700 (7th Cir.1990) ("A finding is clearly erroneous when, although there may be some evidence to support it, 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' We may have such a conviction if the trial judge's interpretation of the facts is implausible, illogical, and internally inconsistent or contradicted by documentary or other extrinsic evidence.' ") (citations omitted), *cert. den.*, 502 U.S. 813, 112 S.Ct. 62, 116 L.Ed.2d 38 (1991); *United States v. Jacquinot*, 258 F.3d 423, 427 (5th Cir.2001) ("A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole."); *Conte v. Gen. Housewares Corp.*, 215 F.3d 628, 634 (6th Cir.2000) ("[W]e cannot conclude that the district court's decision was so unreasonable, illogical, or arbitrary as to constitute an abuse of discretion."). This analysis is entirely consistent with this Court's review in *Harris* and *Blackledge*, cases involving defects in the habeas processes that frustrated factual development, the use of an abuse of discretion standard of review, and remands for that fact development to determine whether it merits relief.

In this case the correct legal rule for analyzing a request for new counsel based on counsel's failure to investigate "newly discovered" evidence is found in 18 U.S.C. §3006A(a)(2)(B), specifically that a "court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings". (Pet. App. at pp. 2-3). The court below held that "the district court's failure to exercise its discretion foreclosed the possibility that different counsel, upon proper consultation with [Mr. Clair] would have taken additional

necessary action with respect to prosecuting [Mr. Clair's] habeas petition..." (Pet. App. at p. 5). It also foreclosed the possibility the Mr. Clair's counsel at the time would acquiesce and undertake the necessary steps to preserve review, as that counsel had done when Mr. Clair previously requested it. These steps, according to the court below, might have included seeking an evidentiary hearing or seeking a stay to pursue proper relief in state court to "to ensure that the allegedly newly discovered physical evidence was given due consideration, and if appropriate, incorporated into Mr. Clair's habeas petition." (Pet. App. at p. 5). The court below found that in not making any inquiry when alerted to an important discovery of evidence and in not explaining its decision the district court either failed to apply the "correct interests of justice standard" or when faced with contradictory documentary evidence, did so an "implausible, illogical or unreasonable manner."

There is simply no reason to review the Court of Appeal's fact bound and faithful application of abuse of discretion standards to the complicated and unusual facts of this case.

II. The Writ Should Not Issue Given the Interlocutory Nature of the Panel's Decision

This Court should decline exercise of its certiorari jurisdiction due to the interlocutory posture of the case below. While it is true that this Court has jurisdiction to review interlocutory judgments of federal courts of appeals, the interlocutory nature of a federal appellate court's judgment is relevant to this Court's discretionary assessment of the appropriateness of immediately reviewing such a judgment. *See*, Stern & Greshman, *Supreme Court Practice*, 9th Ed. Ch. 4.17 at 280. While Petitioner notes that the "Ninth Circuit's decision here is interlocutory in nature", it offers little reason, let alone extraordinary reason, for exercise of this Court's certiorari jurisdiction. (Brief of Pet. at p.16). There is simply nothing extraordinary

about a remand to the district court to allow Mr. Clair the opportunity to examine exculpatory evidence hidden from him for nearly fifteen (15) years. This is hardly the watershed moment with respect to the creation of new ways to inject delay into death penalty cases described by Petitioner. To the contrary, the facts of this case are unique and exist in a procedural thicket that involves a pending state court petition that may moot out the entire matter. This complicated situation is entirely the creation of the state's failure to disclose the evidence for nearly 15 years; the late discovery of such evidence; and, the failure of the District Court to take appropriate action and inquire as to the effect of this discovery before it rendered judgment. Therefore, the unpublished opinion of the court below has no application beyond the context of the present remand.

In the certiorari context, "this Court should not issue a writ of certiorari to a review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, Tampa & Key W.Ry.Co.*, 148 U.S. 372, 384 (1893). Moreover, as this Court said in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), certiorari jurisdiction "is to be used sparingly, and only cases of peculiar gravity and general importance, or in order to secure uniformity of decision. * * * And, except in extraordinary cases the writ is not issued until final decree." Indeed, the lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for the denial of the application." *Id. See also, Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring), where certiorari was granted after final judgment was entered, *United States v. Virginia*, 518 U.S. 515 (1996); *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting) (referring to "the Court's normal practice of denying interlocutory review");

Brotherhood of Locomotive Firemen v. Bangor & Aroostock .R.R. Co., 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court."

The opinion of the court below contemplates that on remand, "counsel shall consult with Mr. Clair and determine what actions and submissions to the district court, if any, would be appropriate before the district court rules anew on Mr. Clair's habeas petition, and then proceed accordingly." (Pet. App. at p. 6). It is possible that on remand, and after consideration of Mr. Clair's submissions "including any requests from counsel to amend the petition to add claims based on related to the alleged new physical evidence", that the district court could grant relief, either as to guilt or penalty based on the evidence. (Pet. App. at p.6). It could also deny relief. Either way both Mr. Clair and Petitioner could seek review in the court below. There is nothing in the record before this Court or in this Court's jurisprudence warranting review at this time. Therefore, Petitioner's writ of certiorari should be denied.

III. The Rule 60 (b) Proceedings and the Secret Evidence Allegations are a Red Herring

Petitioner asserts that the District Court examined the evidence before the Court of Appeal that Mr. Clair wished to pursue when it denied the Rule 60(b) motion, and found it wanting and unmeritorious of relief from judgment. This is simply untrue.

The factual record before the District Court during the Rule 60(b) proceedings was limited. The District Court denied funding for experts to examine the evidence and denied discovery. It was advised of the state court discovery hearings about to take place, yet denied the Rule 60(b) application hastily and without briefing, preventing consideration of information gathered in the state proceedings. And, the denial was well before the DNA testing results were disclosed.

Further, the ruling on the Rule 60(b) motion was based entirely on the fact that Mr. Clair could not establish he was entitled to relief. That court went so far as to say the Mr. Clair could not establish testing would help his case. But, that was the point – Mr. Clair needed the processes of the court, discovery, counsel and a hearing to pursue this evidence in order to demonstrate it matters. As the Court of Appeal noted, because of these restrictions on Rule 60(b), it was of limited utility and the denial of relief based on that motion had no effect on its analysis. (Pet. App. at p. 5-6, fn 1).

Petitioner also alleges that it was denied the ability to contest the evidence relied on by the court below in granting a remand. Petitioner refers to the "secret evidence" used by the court. Petitioner is plainly incorrect.

Petitioner nowhere describes what was sealed or the bases for sealing, or even provides the record relating to that sealing decision. Its failure to provide these basic documents or even discuss them speaks volumes about its intent here.

Apparently, Petitioner is referring to portions of a declaration by counsel and one by the private investigator. These were submitted as part of the Rule 60(b) proceedings before the District Court and partially redacted to exclude attorney-client discussions, as disclosed in the motion to seal before the District Court. (ER 232-239 [redacted version]; ER 3508-3523 [sealed versions]). As discussed, the Rule 60(b) proceedings are of limited relevance here as the court below did not rest its decision on Rule 60(b) at all, and the record in that proceeding was of little, if any, importance given subsequent events. The redacted portions, dealing with the relationship between Mr. Clair and his investigator, and his counsel, were never cited by the court below as a basis for its remand, nor were any references made to the redacted portions of the declarations in

question, if those are the ones Petitioner is now complaining about. In fact, the court below disavowed the Rule 60(b) efforts by Mr. Clair. (PA 5-6, fn 1).

Petitioner clearly has waived any argument of unfairness below and is merely posturing before this Court. The record before the District Court is that Mr. Clair moved to submit limited portions of these declarations under seal. He described the events concerning Mr. Clair's relationship with his counsel in detail in the briefing. (ER 223-236). He even submitted his own declaration with similar material. (ER 217-219). Much of what was discussed in the sealed portions is contained in his two letters to the District Court. (ER 70-73; ER 258-60). Petitioner has never questioned any of the representations in those materials and instead has been content to argue that Mr. Clair has no rights vis-a-vis his post-conviction counsel's actions or inactions.

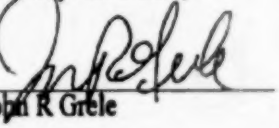
Not only is Petitioner posturing here, but it has waived any complaints in this regard. When Mr. Clair presented the declarations under seal to the Court of Appeal, as he must under Circuit Rule 27-3(b), Petitioner made no objection or motion under Circuit Rule 27-3(d). Petitioner quibbled about the sealed filing in some later filing, but did not argue the District Court abused its discretion in sealing attorney-client portions of the declarations, nor did it argue that the Court of Appeal could not consider them.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: May 18, 2011

Respectfully submitted,

By: 
John R Grele

John R Grele*
David W. Fermino
* Counsel of Record

Attorneys for Respondent
Kenneth Clair

DECLARATION OF SERVICE BY U.S. MAIL

RE: *Michael Martel v. Kenneth Clair*
No. 10-1265

I, Samuel Plainfield, declare that I am over 18 years of age and not a party to the within cause; my business address is 149 Natoma St., 3rd floor, San Francisco, CA, 94105. On May 18, 2011, I served a true copy of the following documents:

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

on the following by U.S. Mail as follows:

Barry J. T. Carlton
Supervising Deputy Attorney General
110 West A St., Suite 1100
P.O. Box 85266
San Diego, CA 92186
Barry.Carlton@doj.ca.gov
(Two copies of brief)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 18, 2011, at San Francisco, California.

SAMUEL PLAINFIELD

REPLY BRIEF

Supreme Court, U.S.
FILED
MAY 31 2011
OFFICE OF THE CLERK

No. 10-1265

In the Supreme Court of the United States

MICHAEL MARTEL, *Petitioner,*

v.

KENNETH CLAIR, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
GARY W. SCHONS
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
BARRY J. T. CARLTON
Supervising Deputy Attorney General
Counsel of Record
110 West A Street, Suite 1100
San Diego, CA 92101
Telephone: (619) 645-2272
E-mail: Barry.Carlton@doj.ca.gov
Counsel for Petitioner

Library of Congress
Law Library

REPLY BRIEF

The State's petition seeks certiorari on the question of whether condemned prisoners in habeas corpus have a statutory right to replace court-appointed counsel with new counsel without any showing or finding that appointed counsel had failed in his duties and that replacement was necessary to avoid unconstitutional unreliability in the proceedings. As the State explained, nothing in the appointment-of-counsel statutes upon which the Ninth Circuit relied supports granting prisoners such an improbable do-it-yourself power—greater than any prerogative granted even to defendants at their criminal trials—to nullify prior federal proceedings and to drag out new proceedings to further delay the carrying out of a state-court judgment. Nor may such statutes be interpreted, as the Ninth Circuit did, to allow a prisoner to use an unnecessary appointment of new counsel as a device to litigate new claims for habeas corpus relief without regard to the policies and strict limits on successive claims laid down in 28 U.S.C. § 2244.

Respondent Clair's opposition brief only confirms the State's argument about why the Ninth Circuit ruling is so mischievious. Clair freely acknowledges that, although he and the Ninth Circuit purport to trace this novel prerogative to the prisoner's asserted right to "meaningful" counsel, his demand for new appointed counsel to re-open the district court proceedings has nothing to do with any poor performance by his federal public defender at all. Instead, Clair argues that he is entitled to a re-do of his federal case because of alleged misconduct by the state and alleged new claims for relief. But the Ninth Circuit never offered any such argument as support for its decision requiring

appointment of new counsel and new proceedings in the district court. And, even if Clair could prove his allegations, his avenue for doing so now is only that of leave to file a successive petition under the tight restrictions of § 2244.

Clair's acknowledgment about the performance of his court-appointed public defender brings into relief the fact that the Ninth Circuit order, allowing new appointed counsel to seek re-litigation of the district court habeas corpus proceedings, including new claims, was crucially based only on Clair's self-serving and belatedly professed unhappiness with his appointed counsel. Focusing instead on facile allegations of wrongdoing and new claims for relief, Clair makes no attempt to justify the Ninth Circuit's decision under any right-to-counsel jurisprudence governing habeas corpus cases, or any right-to-counsel jurisprudence at all. For instance, Clair does not address why a convicted prisoner should enjoy a right to replace counsel that is greater than the right possessed by a presumed-innocent criminal defendant or why, unlike the criminal defendant, the prisoner might obtain relief, as Clair did here, without any showing of prejudice.

And, as Clair makes clear in his opposition brief, the claims he intends to bring will extend even beyond what he already attempted to put before the district court in his unsuccessful Rule 60(b) motion. (Opp. App.) The plan is plain: piecemeal presentation of successive claims in violation of fundamental AEDPA policy and § 2244 restrictions, with an alleged right to so-called "meaningful" counsel and the "interests of justice" as the pretext. Clair's brief never explains how the Ninth Circuit's decision could ever be consistent with AEDPA. Instead, he merely relies on the fact that it benefits his own interests.

Clair's reliance on the interlocutory nature of the Ninth Circuit decision as a basis for denying certiorari is misplaced. Interlocutory review is often disfavored because there is usually some benefit to be gained from deterring review until litigation concludes. This case does not present any such concern. Instead, it illustrates the substantial impairment to the State's ability to enforce death judgments that will arise from the years of delay that will be interjected into capital habeas proceedings from the end-run the Ninth Circuit is permitting around AEDPA's limits on piecemeal adjudication of habeas claims. The magnitude of the damage to the State's interest in finality, and the threat to AEDPA posed by this kind of end-run around § 2244's successive-petition prohibition, support a grant of certiorari regardless of whether the Ninth Circuit's order is dispositive of all matters pertaining to Clair's federal habeas proceeding. See, *e.g.*, *Martin* v. *Walker*, 131 S.Ct. 1120, 1124, 179 L.Ed.2d 62 (2011).

Finally, the Ninth Circuit's elastic view of the statutory right to counsel in capital habeas corpus cases has created unacceptable mischief not only in this case but in other cases. For example, it elsewhere has served as the basis for indefinite and perhaps permanent stays of execution. See *Rohan ex rel. Gates* v. *Woodford*, 334 F.3d 803, 813 (9th Cir. 2003) (suspension of proceedings for incompetence of petitioner); *Nash* v. *Ryan*, 581 F.3d 1048, 1051-1055 (9th Cir. 2009) (suspension of appeal from denial of relief for incompetence of petitioner). Such a stay of proceedings based on the Ninth Circuit's right-to-meaningful-counsel theory is the basis of Arizona's pending petition for certiorari in *Ryan* v. *Gonzales* (No. 10-930). While that case involves the question of whether a petitioner must be competent in order

to have meaningful assistance from statutorily appointed habeas counsel in a § 2254 proceeding, this case entails a situation where neither the Ninth Circuit nor Clair dispute that the Federal Public Defender was effective. Accordingly, while related to the interpretation of the statutory right to counsel afforded capital state inmates on federal habeas raised in *Ryan* v. *Gonzales*, the important question presented here involves the extent of a condemned state prisoner's rights regarding substitution of court-appointed counsel in a § 2254 proceeding.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
GARY W. SCHONS
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
BARRY J. T. CARLTON
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner

May 31, 2011

BJTC:sm
SD2011700987
70472096.doc

JOINT APPENDIX

No. 10-1265

In The Supreme Court of the United States

MICHAEL MARTEL, Warden,

Petitioner,

v.

KENNETH CLAIR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

SETH P. WAXMAN*
**Counsel of Record*
EDWARD C. DUMONT
CATHERINE M.A. CARROLL
ARON B. GOETZL
WILMER CUTLER PICKERING
HALE AND DORR, LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

Counsel for Respondent

KAMALA D. HARRIS
Attorney General of California
BARRY J.T. CARLTON
Supervising Deputy Attorney General
WARD A. CAMPBELL*
Supervising Deputy Attorney General
**Counsel of Record*
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street
P.O. Box 944255
Sacramento, California 94244-2550
(916) 324-5251
ward.campbell@doj.ca.gov

Counsel for Petitioner

Petition For Certiorari Filed April 12, 2011
Certiorari Granted June 27, 2011

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR, LLP
399 Park Avenue
New York, NY 10022
(212) 937 7294

JOHN R. GRELE
LAW OFFICES OF
JOHN R. GRELE
149 Natoma Street, 3rd floor
San Francisco, CA 94105
(415) 348-9300

DAVID W. FERMINO
Attorney at Law
149 Natoma Street, 3rd Floor
San Francisco, CA 94105
(415) 568-7550

Counsel for Respondent

DANE R. GILLETTE
Chief Assistant Attorney
General
DONALD E. DENICOLA
Deputy State Solicitor
General
MICHAEL P. FARRELL
Senior Assistant Attorney
General
CALIFORNIA DEPARTMENT
OF JUSTICE
1300 I Street
P.O. Box 944255
Sacramento, California
94244-2550
(916) 324-5251

Counsel for Petitioner

TABLE OF CONTENTS

Page

Relevant Docket Entries for the United States District Court for the Central District of California, Case No. CV 93-1133 1

Relevant Docket Entries for the United States Court of Appeals for the Ninth Circuit, Case No. 05-99005 12

Relevant Docket Entries for the United States Court of Appeals for the Ninth Circuit, Case No. 08-75135 16

Civil Minutes and Attached Correspondence from Petitioner dated March 16, 2005, United States District Court for the Central District of California, Case No. CV 93-1133 GLT, Dist. Ct. Dkt. 399 (filed March 28, 2005) 18

Petitioner's Response to the Court's Order Regarding Mr. Clair's Letter to the Court, United States District Court for the Central District of California, Case No. CV 93-1133 GLT, Dist. Ct. Dkt. 402 (filed April 27, 2005) 26

Response to Petitioner's Complaint about Counsel, United States District Court for the Central District of California, Case No. CV 93-1133 GLT, Dist. Ct. Dkt. 401 (filed April 28, 2005) 28

TABLE OF CONTENTS – Continued

Page

Civil Minutes, Petitioner's Correspondence Regarding Counsel, United States District Court for the Central District of California, Case No. CV 93-1133 GLT, Dist. Ct. Dkt. 400 (filed April 29, 2005) 33

Petitioner's Notice of Filing of Declarations of Pauline Flores, Barbara Perry, and Opal Brown in Support of His Habeas Corpus Petition, United States District Court for the Central District of California, Case No. CV-93-1133 GLT, Dist. Ct. Dkt. 405 (filed June 3, 2005) 34

Declaration of Pauline Flores (aka Cody, aka Nietz) in Support of Kenneth Clair's Federal Proceedings, United States District Court for the Central District of California, Case No. CV 93-1133 GLT, Dist. Ct. Dkt. 405 (filed June 3, 2005) 36

Declaration of Opal Brown in Support of Kenneth Clair's Federal Proceedings, United States District Court for the Central District of California, Case No. CV 93-1133 GLT, Dist. Ct. Dkt. 405 (filed June 3, 2005) 43

Declaration of Barbara Perry (aka Brown) in Support of Kenneth Clair's Federal Proceedings, United States District Court for the Central District of California, Case No. CV 93-1133 GLT, Dist. Ct. Dkt. 405 (filed June 3, 2005) 47

TABLE OF CONTENTS – Continued

Page

Civil Minutes, Notice to Parties Regarding Late-filed Declarations, United States District Court for the Central District of California, Case No. CV 93-1133 GLT, Dist. Ct. Dkt. 404 (filed June 7, 2005) 51

Notice of Document Discrepancies, United States District Court for the Central District of California, Case No. CV 93-1133 GLT, Dist. Ct. Dkt. 406 (filed June 24, 2005) 53

Letter to Dist. Court from C.J. Ford Private Investigators, United States District Court for the Central District of California, Case No. CV 93-1133 GLT, Dist. Ct. Dkt. 406 (received/returned without filing June 24, 2005) (filed at pp. 243-245, Excerpts of Record, *Clair v. Ayers*, United States Court of Appeals for the Ninth Circuit, Case No. 05-99005) 56

Civil Minutes, Letter from Defendant and Attached Letter from Defendant dated June 16, 2005, United States District Court for the Central District of California, Case No. CV 93-1133 GLT, Dist. Ct. Dkt. 407 (filed June 30, 2005) 61

Record Transmittal Form for Sealed Documents, United States District Court for the Central District of California, Case No. CV 93-1133 CAS, Dist. Ct. Dkt. 461 (filed September 11, 2009) 73

TABLE OF CONTENTS – Continued

Page

The following opinions, orders, authorities, and other relevant court documents have been omitted in printing this Joint Appendix because they appear on the following pages in the appendices to the Petition for a Writ of Certiorari and the Opposition to the Petition for Writ of Certiorari.

Appendix to the Petition for Writ of Certiorari

Memorandum Opinion Vacating Appeal and Remanding Case to District Court, United States Court of Appeals for the Ninth Circuit, *Clair v. Ayers*, Case Nos. 05-99005 and 08-75135 (filed November 17, 2010) 1

Order Directing Supplemental Briefing on Appeal, United States Court of Appeals for the Ninth Circuit, *Clair v. Ayers*, Case No. 05-99005 (filed June 12, 2009).....7

Order Denying Motion to Vacate Judgment Under Federal Rule of Civil Procedure 60(b), United States District Court for the Central District of California, *Clair v. Ayers*, Case No. CV 93-1133 CAS (filed May 21, 2007) 8

Order Granting Limited Remand for Determination on Rule 60(b) Motion, United States Court of Appeals for the Ninth Circuit, *Clair v. Ayers*, Case No. 05-99005 (filed April 9, 2007) 12

TABLE OF CONTENTS – Continued

Page

Order Denying Application to Entertain Rule 60(b) Motion, United States District Court for the Central District of California, *Clair v. Ayers*, Case No. CV 93-1133 CAS (entered September 22, 2006) 14

Judgment Denying Habeas Corpus Petition, United States District Court for the Central District of California, *Clair v. Brown*, Case No. CV 93-1133 GLT (filed June 30, 2005) 20

District Court Order Denying Petition for Writ of Habeas Corpus and Issuing Certificate of Appealability, United States District Court for the Central District of California, *Clair v. Brown*, Case No. CV 93-1133 GLT (filed June 30, 2005) 21

18 U.S.C. § 3006A (excerpts) 92

18 U.S.C. § 3599 (excerpts) 94

28 U.S.C. § 2244 97

28 U.S.C. § 2254 100

TABLE OF CONTENTS – Continued

Page

Appendix to the Opposition to the Petition for Writ of Certiorari

Application to File Successor Petition as a *Pace* Protective Petition and for Remand for the District Court to Permit Amendment of Petition, and to Permit Completion of the Record, United States Court of Appeals for the Ninth Circuit, *Clair v. Ayers*, Case No. 08-75135 (received and filed December 19, 2008) 1

Protective Petition for Writ of Habeas Corpus, United States Court of Appeals for the Ninth Circuit, *Clair v. Ayers*, Case No. 08-75135 (received and filed December 19, 2008). 31

Exhibits in Support of Protective Petition for Writ of Habeas Corpus and in Support of Application to File Successor Petition and for Remand, United States Court of Appeals for the Ninth Circuit, *Clair v. Ayers*, Case No. 08-75135 (received and filed December 19, 2008) 54

Order Denying Motion to Consider and for Remand, United States Court of Appeals for the Ninth Circuit, *Clair v. Ayers*, Case Nos. 05-99005 and 08-75135 (filed November 16, 2010) 236

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
2:93-cv-01133

Date Filed	No.	Docket Text
02/26/1993	1	REQUEST by petitioner Kenneth Clair for Appointment of Counsel in California Death Sentence Case & For Stay of Execution on April 13, 1993 (ca) (Entered: 03/04/1993)
07/22/1993	16	ORDER by Judge Gary L. Taylor Appt of cnsl, Henry H. Rossbacher to represent petr in these h/c death penalty proceedings. This signed ord shld be removed from under seal. (mco) (Entered: 07/27/1993)
09/15/1994	71	PETITION FOR WRIT OF HABEAS CORPUS by petitioner Kenneth Clair in state custody. UNDER SEAL (kr) (Entered: 10/05/1994)
07/19/1995	95	NOTICE of iss of ruling by cali supreme crt on ptnrs state hab corp by petitioner Kenneth Clair (kr) (Entered: 07/20/1995)
10/16/1995	106	First AMENDED PETITION FOR WRIT OF HABEAS CORPUS (kr) (Entered: 10/25/1995)
01/09/1998	195	MINUTES: re approval of subt of cnsl; having received defts written consnet, the crt subts Linda L.

		Griffis and Julie A. Langslet as attys of record in palce of Rossbacher & Associates by Judge Gary L. Taylor CR: na (yt) (Entered: 01/16/1998)
08/20/2004	374	MINUTES OF Evidentiary Hearing held before Judge Gary L. Taylor; Witnesses called, sworn and testified; exhibits identified; exhibits admitted; case continued for further Evidentiary Hearing on 8/24/2004 09:00 AM before Honorable Gary L. Taylor.Court Reporter: Deborah Parker. (ln,) (Entered: 08/26/2004)
08/24/2004	375	MINUTES OF Evidentiary Hearing held before Judge Gary L. Taylor; witnesses called, sworn and testified; exhibits identified; exhibits admitted; petitioner rests; respondent rests; filed witness and exhibit list(s); Court sets briefing schedule for closing argument briefs as follows: petitioners brief is to be filed and served by close of business on 10/25/04; respondents brief is to be filed and served by close of business on 12/20/04; petitioners final brief is to be filed and served by close of business on 01/31/05 whereupon matter stands submitted;Court Reporter: Deborah Parker. (ln,) (Entered: 08/26/2004)

03/28/2005	399	MINUTES OF IN CHAMBERS ORDER by Judge Gary L. Taylor : petitioners correspondence states he no longer wants his case to be handled by present attorneys. Court requests parties to state their positions concerning this letter Court Reporter: none. (dmjr,) (Entered: 03/29/2005)
04/29/2005	400	MINUTES OF IN CHAMBERS ORDER by Judge Gary L. Taylor : petitioner's correspondence, court will take no further action on the matter at this time Court Reporter: none. (dmjr,) (Entered: 05/02/2005)
04/28/2005	401	RESPONSE to Petitioners complaint about counsel filed by Respondent Jeanne Woodford (ir,) (Entered: 05/03/2005)
04/27/2005	402	RESPONSE to Courts Order regarding Mr Clair Letter to the Court 399 filed by Petitioner Kenneth Clair (ir,) (Entered: 05/10/2005)
06/07/2005	404	MINUTES Notice to parties regarding late-filed declarations IN CHAMBERS ORDER by Judge Gary L. Taylor : The court has received copies of declaratins [sic] by Pauline Flores, Barbara Perry, and Opal Brown, filed in support of the Amended Petition for Writ of Habeas Corpus. Both parties are instructed that the court considers

the papers in this case to be complete and does not wish to receive any additional material. Because the declarants are significant figures in the case, the court will review the declarations to determine whether they are likely to affect the court's consideration of the issues. If and only if the court believes that these declarations may change the court's view of the facts, the parties may be requested to submit additional material concerning these declarations. At that time, respondent may voice any concerns she may have about propriety or substance of these declarations. Until then, there are to be no further filings in this case. This matter stands submitted for decision. Court Reporter: none. (twdb,) (Entered: 06/09/2005)

06/03/2005 405 NOTICE of filing of declarations of Pauline Flores, Barbara Perry and Opal Brown in support of his habeas corpus petition filed by petitioner Kenneth Clair. (ca,) (Entered: 06/15/2005)

06/24/2005 406 NOTICE OF DISCREPANCY AND ORDER by Judge Gary L. Taylor: ORDERING Letter to Judge submitted on behalf of Petitioner Kenneth Clair received on 06/21/05 is not to be filed but instead rejected.

Denial based on: Local Rule 83.2.11 no communication with Judge by letter.(ln,) (Entered: 06/27/2005)

06/30/2005 407 MINUTES Letter from defendant IN CHAMBERS ORDER by Judge Gary L. Taylor : The court has received the attached letter from defendant, requesting a change of counsel. It does not appear to the court that a change of counsel is appropriate. It appears that petitioner's counsel is doing a proper job. No conflict of interest or inadequacy of counsel is shown. Court Reporter: none present. (twdb,) (Entered: 06/30/2005)

06/30/2005 408 JUDGMENT by Judge Gary L. Taylor. It is hereby ordered, adjudged and decreed that petitioner Kenneth Clair's petition for writ of habeas corpus be DENIED. (MD JS-6, Case Terminated).(twdb,) (Entered: 06/30/2005)

06/30/2005 409 ORDER Denying petition for writ of habeas corpus and issuing Certificate of Appealability by Judge Gary L. Taylor. Pursuant to Local Rule 83-17.6(b), the Stay of Execution in this case shall continue until the Court of Appeals acts upon the appeal or the order of stay.(twdb,) (Entered: 06/30/2005)

07/29/2005	410	NOTICE OF APPEAL to 9th CCA filed by petitoner [sic] Kenneth Clair. Appeal of Judgment 408, Filed On: 06/30/05, Entered On: 06/30/05; Order, 409 Filed On: 06/30/05; Entered On: 06/30/05. Certificate of Appealability Pending. cc: Mark Drozdowski, Federal Public Defender; Barry J. Carlton, Deputy Attorney General; Kenneth Clair. (cbr,) (Entered: 08/02/2005)
08/03/2005	412	NOTICE OF APPEAL to 9th CCA filed by petitioner Kenneth Clair. Appeal of Order, 407 Filed On: 06/30/05; Entered On: 06/30/05. Certificate of Appealability Granted. cc: Kenneth Clair; State Attorney General. (cbr,) (Entered: 08/08/2005)
11/02/2005	420	ORDER from 9th CCA filed as to Appeal to Circuit Court 412 filed by Kenneth Clair, CCA #05-56327. The District Court denial of Petitioner pro se motion for disqualification of counsel is not subject to independent appeal, We dismiss petitioner pro se appeal, #05-56237, and direct the Clerk to close that appeal. The Clerk is directed to transfer petitioner pro se notice of appeal and file that document in petitioner counseled Appeal to Circuit Court 410, CCA #05-99005 from the District Court final judgment. Order received in this district on 11/2/2005. (jp,) (Entered: 11/07/2005)

11/04/2005	422	ORDER from 9th CCA filed as to Appeal to Circuit Court 410 filed by Kenneth Clair, CCA # 05-99005. Order received in this district on 11/9/2005. The October 21, 2005 response by counsel Mark R. Drozdowski is construed as a motion for the appointment of new counsel on appeal. The motion is GRANTED. Mr. Clair requested the appointment of Professor Lawrence C. Marshall of Standford [sic] Law School. That request is denied. Applellant [sic] opening brief and excerpts of record are due 2/2/2006. Appellee answering brief is due 3/21/2006. Applellant [sic] optional reply brief, if any, is due within 21 days after service of Appellee brief. (jp,) (Entered: 11/10/2005)
06/30/2006	424	APPLICATION for Indication to Entertain or Grant Rule 60(b) Motion; Memorandum of Points and Authorities filed by petitioner Kenneth Clair. Application set for hearing on 7/31/2006 at 10:00 AM before Judge Christina A. Snyder. Lodged Proposed Order. (pcl,) (Entered: 07/18/2006)
06/30/2006	425	MOTION for Relief from Judgment Under Rule 60(b) 408 ; Memorandum of Points and Authorities; (Redacted) Declaration of John R Brele [sic] filed by petitioner Kenneth Clair.

		Motion set for hearing on 7/31/2006 at 10:00 AM before Judge Christina A. Snyder. Lodged proposed order. (pcl,) (Entered: 07/18/2006)
06/30/2006	426	APPLICATION to File Under Seal; Declaration of John R Grele filed by petitioner Kenneth Clair. Lodged Proposed Order. (pcl,) (Entered: 07/18/2006
07/14/2006	428	ORDER by Judge Christina A. Snyder GRANTS the Application to Seal 426 . Declaration of John R Grele (unredacted) and the Declaration of CJ Ford are ordered filed under seal. (ir,) (Entered: 07/19/2006)
07/14/2006	429	SEALED DOCUMENT – DECLARATION of John R Grele and CJ Ford in support of Motion for Relief from Judgment 408 425 (ir,) (Entered: 07/19/2006)
09/21/2006	435	ORDER DENYING APPLICATION TO ENTERTAIN MOTION: The Court is unpersuaded that the proposed motion is meritorious and accordingly declines the invitation consider a motion to set aside the judgment in this case. The Application to entertain a Rule 60(b) motion is therefore DENIED 408 424 . IT IS SO ORDERED by Judge Christina A. Snyder. (klg,) (Entered: 09/22/2006)

04/09/2007	440	ORDER from 9th CCA filed as to Appeal to Circuit Court, 410 filed by Kenneth Clair, CCA # 05-99005. Order received in this district on 4/12/07. The district court denied Petitioners request that it entertain his Rule 60(b) motion. However, because we conclude that Petitioner should be able to appeal the district courts decision on the merits of Petitioners Rule 60(b) motion, we grant a limited remand for a determination of petitioners yet-to-be filed rule 60(b) motion. Petitioner shall file his Rule 60(b) motion in the district court within 30 days of the date of this order, unless that time in [sic] extended by the district court. We express no opinion on the merits of Petitioners Rule 60(b) motion. The district court shall also address Respondents argument that documents which Petitioner filed under seal (which apparently were also filed ex parte) must be unsealed (or at least serve upon Respondent) so that Respondent may address the merits of Petitoners [sic] Rule 60(b) motion. Appellate proceedings in this case number are stayed pending further order of this Court. (lr,) (Entered: 04/16/2007)
05/21/2007	447	ORDER by Judge Christina A. Snyder Denying Motion to Vacate

Judgment Under Federal Rule of Civil Procedure 60(b)[**SEE ORDER FOR DETAILS**] 425 . The Court GRANTS Petitioner's Request to Extend Time to File, and deems Petitioner's motion papers timely filed. The Court DENIES the Motion to Vacate the Judgment, on the grounds set forth in its prior Order denying the Application 425 . The Petitioner has filed a number of other motions with this Court in anticipation of further proceedings at this level. This Court having complied with the mandate of the Ninth Circuit, USCA Order 440, and ruled upon the proffered Motion, no further proceedings are necessary. Accordingly, the MOTION for Order to permit discovery 444, the Joint Stipulation for Discovery 445, the Request to Set a Hearing Date, and the Application for Expert Services 442 are all DENIED. There remaining no matters at issue, the Court views this matter as closed. Pursuant to the direction by the Court of Appeals, this Court GRANTS a Certificate of Appealability as to t6he [sic] issues raised by Petitioner's Motion to Vacate Judgment.(cj) (Entered: 05/22/2007)

06/20/2007 454 NOTICE OF APPEAL to 9th CCA filed by petitioner Kenneth Clair.

		Appeal of Order 447 . Filed On: 5/21/2007; Entered On: 5/22/2007; Certificate of Appealability is GRANTED. cc: John R. Grele; Barry J. Carlton (dmap)
09/11/2009	461	APPEAL RECORD sealed documents sent to Circuit Court re: Appeal number, 05-99005. 62 documents were sent with this transmittal. Document numbers S0028, S0033, S0035, S0036, S0037, S0038, S0041, S0044, S0045, S0046, S0047, S0048, S0049, S0050, S0053, S0055, S0057, S0071, S0081, S0082, S0089, S0090, S0092, S0093, S0096, S0099, S0100, S0101, S0104, S0105, S0154, S0162, S0170, S0173, S0174, S0176, S0178, S0181, S0196, S0197, S0218, S0232, S0236, S0241, S0270, S0293, S0326, S0327, S0328, S0239, S0330, S0331, S0332, S0335, S0336, S0337, S0338, S0394, S0429, S0438, S0439, S0442. Re: Appeal Record Sent to USCA (A-26) 460 (lr) (Entered: 09/14/2009)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
05-99005

Date Filed	No.	Docket Text
09/15/2005	4	Filed Order . . . Because the district court's denial of petitioner's pro se motion for disqualification of counsel is not subject to independent appeal, see Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 369-70 (1981), we dismiss petitioner's pro se appeal, No. 05-56237, and direct the Clerk to close that appeal. The Clerk is directed to transfer petitioner's pro se notice of appeal and file that document in petitioner's conseled [sic] appeal (No. 5-99005) from the district court's final judgment. Within 30 days of the date this order, counsel shall, after consultation with his client, respond to the issues raised by petitioner's pro se notice of appeal. The response shall be referred to the Appellate Commissioner for such consideration as he deems appropriate. (Procedurally Terminated After Other Judicial Action; Dismissed/Other. Stephen R. REINHARDT, Pamela A. RYMER, Michael D. HAWKINS) [05-56327, 05-99005] (PA)

10/24/2005	9	Filed atty for appellant's response to Court's 9/15/05 Order Served on 10/21/05. (DPStaff/Atty) [4] [05-99005] (PA)
11/04/2005	11	Filed order (Appellate Commissioner) The 10/21/05 response by counsel Mark R. Drozdowski, Esq., is construed as a motion for the appointment of new counsel on appeal. So construed, the motion is granted. Counsel wil be appointed by separate order. In a 6/16/05 letter to the district court, Mr. Clair requested the appointment of Professor Lawrence C. Marshall of Stanford Law School. That request is denied (cite) . . . The clerk shall serve a copy of this order by facsimile transmission on Maria E. Stratton, Federal Public Defender, 321 E. Second St., Los Angeles, CA 90012-4206 (fax: 213/894-0081), who will locate new counsel, outside of the FPD's Office, for Mr. Clair. The district court shall provide this court with the name and address of appointed counsel by facsimile transmission (fax: 415/556-6228) within 14 days of locating counsel. Aplt's opening brief and excerpts of record are due 2/2/06; aple's brief is due 3/21/06. Aplt's optional reply brief, if any, is due within 21 days after

		service of the aple's brief. (served to csl) (ME) [05-99005] (EU)
01/12/2006	18	Received copy of District Court order filed on January 10, 2006 appointing John R. Grele, Esq., counsel of record for petitioner. [05-99005] (DL)
04/09/2007	34	Filed order (Diarmuid F. O'SCANNLAIN, Susan P. GRABER, Carlos T. BEA): The district court denied Petitioner's request that it entertain his Rule 60(b) motion. However, because we conclude that Petitioner should be able to appeal the district court's decision on the merits of Petitioner's Rule 60(b) motion, we grant a limited remand for a determination of Petitioner's yet-to-be filed Rule 60(b) motion. Petitioner shall file his Rule 60(b) motion in the district court within 30 days of the date of this order, unless that time is extended by the district court. We express no opinion on the merits of Petitioner's Rule 60(b) motion. The district court shall also address Respondent's argument that documents which Petitioner filed under seal (which apparently were also filed ex parte) must be unsealed (or at least served upon Respondent) so that Respondent may address the emerits [sic] of Petitioner's Rule

		60(b) motion. Appellate proceeding in this case number are stayed pending further order of this court. (Faxed/Served Csl & DC Jdg & DC Clk's Ofc.) [05-99005] (PA)
06/25/2007	35	Received Notice of appeal filed in usdc on 6/20/07 from a limited remand from this court (court sua sponte construed this NOA as amended NOA from this court's order filed on 4/9/07 on limited remand for a determination of Petitioner's yet-to-be filed Rule 60(b) motion. (DP-STAFF/ATTY) (EU)
11/16/2010	133	Filed order (HARRY PREGERSON, STEPHEN R. REINHARDT and KIM MCLANE WARDLAW) Defendant's motion to consider the paper and pleadings on file in a related matter, No. 08-75135, and to grant a limited remand in the event that our court does not grant guilt phase relief is hereby DENIED as moot.[7547193] [05-99005, 08-75135] (PA)
11/17/2010	134	FILED MEMORANDUM DISPOSITION (HARRY PREGERSON, STEPHEN R. REINHARDT and KIM MCLANE WARDLAW) VACATED; REMANDED. FILED AND ENTERED JUDGMENT. [7548148] [05-99005, 08-75135] (DD)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
No. 08-75135

Date Filed	No.	Docket Text
12/19/2008	1	Application to file Successor Petition as a Pace Protective Petition and for Remand for the District Court to permit amendment of Petition, and to Permit Completion of the Record and includes Protective Petition for Writ of Habeas Corpus; Exhibits in support of Protective Petition for Writ of Habeas Corpus and in support of Application to file Successor Petition and for remand. (MOATT) (BY)
11/16/2010	43	Filed order (HARRY PREGERSON, STEPHEN R. REINHARDT and KIM MCLANE WARDLAW) Defendant's motion to consider the paper and pleadings on file in a related matter, No. 08-75135, and to grant a limited remand in the event that our court does not grant guilt phase relief is hereby DENIED as moot. [7547193] [05-99005, 08-75135] (PA)
11/16/2010	44	Filed order (HARRY PREGERSON, STEPHEN R. REINHARDT and KIM MCLANE WARDLAW) Defendant's

motion to file an amended protective petition to preserve newly discovered DNA evidence is hereby TRANSFERRED for consideration in the first instance to the district court.[7547203] (PA)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 93-1133 GLT **Date:** March 28, 2005

Title Kenneth Clair v. Arthur Calderon

DOCKET ENTRY

PRESENT:

HON. GARY L. TAYLOR, **JUDGE** [GLT]

Lisa Bredahl
Deputy Clerk

None Present
Court Reporter (DP)

Attorneys for Defendants:
None

Attorneys for Plaintiff:
None

PROCEEDINGS: [In Chambers]

CORRESPONDENCE FROM PETITIONER
(Filed Mar. 29, 2005)

The Court has received the attached letter from the Petitioner stating he no longer wants his case to be handled by his present attorneys. The Court requests the parties to state their positions concerning this letter.

[ATTACHMENT:

COPY SENT TO:
Kenneth Claire [sic]
D73000
San Quentin Prison
San Quentin, CA 94974
Z E/B 88 5]

H:\DEATH.PEN\93-1133\93-1133.mo2.wpd
Initials of Deputy Clerk bb KR LB

To:Judge Taylor
Federal District Court

From:Kenneth Clair
Case No. CV 93-1133 GLT

March 16,2005

Dear Judge Taylor,

Right now i am so very upset, more hurt than anything else, because for more than twenty year, i thought i knew who the enemy was. The dated of December 7,2004 – my D Day – marks the seventeen year of sitting here for a crime i did not commit and lately everytime i think about that date – i feel as though i am the saddest man in the world.

When in 1992 my case was confirmed by the California Supreme Court, i believed that there was one act left that could be inflicted on me to make a day any more darker then they have been. That one act would fall on the day when the State executes me, an innocent Man. But i was wrong about that! I have come to realizes that my fight for freedom and for my life is not just against the State, but is against the whole damn system and, yes, that even includes the Office of the Federal Public Defender and the attorneys and investigators who are working out of that office.

It is not easy for me to put these thoughts on paper right now because i am very emotional at this time, i protest, these acts that has come from someone with whom i have been working with since 1993, someone who has stabbed me in the back and has made it known to me that i am a nonentity in their eyes. That my word to them has no weight, no meaning, that i have no say so in this fight for my freedom and my life and that even when i am talking to them, they are not listening to anything i am saying at all. An it hurts me deeply, it sears my soul to say that someone is the lead counsel on my case.

Here recently someone contacted her, the lead counsel, and wanted to talk to her about me and help publicize my case by exposing the injustice which has been carried out against me.

In the mid-1990's a journalist or a group from overseas touched base with the attorneys, to offer their assistance and help. Without ever once thinking enough of me, to discuss this with me, she turned them down and away and currently a reporter, a friend of my Mother contacted her, the lead counsel told him that she would like to keep this matter quiet, to not make much noise and to not upset the Federal District Judge.

This incident is the last blow to my heart that i can endure and, believe me, there have been many. The only reason there have continue to be a working relationship between us has been that it was imperative that i continue to believe in her as my attorney.

What follows may give you an idea with what i have been dealing with and i can not take it anymore. I do deserve to be treated with much more respect then what has been shown to me here for some years now.

I had an Evidentiary Hearing before you in August 2004. My attorneys opening brief was filed in October 24,2004. After reading the copy that was sent to me, i became very concerned about parts of the brief and voiced my complaints to the lead counsel. When i heard her say, "I am not sure what was in that part of the brief because i didn't read it. I didn't have the time to read it." I felt as though all of the forces of life was drained out of me. So i responded, "The brief has been filed huh?" She replied, "Yes it has", and i shouted out, "What do you mean, you didn't read it?" Again lead counsel stated that she didn't have time to read it. The fifteen minute telephone call came to an end and i didn't waste my time with calling back. The lead counsel on this case did not think the case was important enough to the work, which she stated had been done by another attorney (co-counsel), before the brief was filed with the court.

The closing brief was filed on Jan.31,2005 and yes the same kind of problems was found by me again after reading the copy that was sent to me and again that team of attorneys that are working on my case has displayed a degree of messiness with the filing of brief's here in this case of mine and they had to either submit a request asking the court to remove this or allowing them to change that. An this is a very serious stage of my appeals.

Because of this there is a major battle being waged within me about lead counsel and about whether or not i can continue to entrust her with my life. When lead counsel came up to see me in November of last year and i brought up that ordeal and some other things, before i could even finish saying what i was saying, she became very defensive with me, upset and angry and in a loud tone stated to me, "Since i am not able to do anything right, fire me." I replied, "Fire you?" She repeated, "Yes fire me. I just sat there and looked with anguish in my eyes! An after talking for awhile, she did apologize for saying that but the damage had been done . . .

For better then ten years i have been trying to get my attorneys to find my alibi witness, Curtis Lee. I have been telling the lead counsel to return to Honeywell, a company where Curtis Lee worked, and to speak to those folks again. I had even many times asked lead counsel to try to get a court order to serve Honeywell, to force the company to relinquish the or their employee records about Curtis Lee. An the last time i had asked her, (early in 2004) and she told me why? The company said they no longer have those records. I remarked that if that were the case, why would Honeywell say . . . "but if we did, then we would need a release form signed by Mr. Lee before we could turn them over to you. . . ." The attorney then stared at me and said, "You need to forget about that." She said, "yes forget about that" and noted that i need to let the pursuit of Curtis Lee go.

So i took matters into my own hands, went outside the loop and had someone discover that for the last twenty years Honeywell's had kept company records on Curtis Lee. An that was information that was made known to me in less then 30 days! With that information i was able to force the Office of the Federal Public Defender and lead counsel to obtain a court order to serve Honeywell. There was certain strange things about that court order, information which made me wonder whether or not the Office of the Federal Public Defender had for years had Curtis Lee's recorders. The attorneys had already in court documents alleged that they couldn't find him. An so as i see it the Federal Attorneys have dropped the ball about finding my alibi witness. Since they know that i am able to use someone independent of the loop to check into things for me, they have, i believe, started both lying and with-holding requested information. I shall be glad to provide more information if needed.

For years i thought that we were on the same team, that is not true, a lesson lately made frighteningly clear to me!!!!!!

The work i have been doing, trying to publicize my case, has involved efforts by me and by some family and friends. The only thing that lead counsel has done, have been to discourage me and others in every which way she could think of. I was lucky enough to find out about the folks she has turned away. It worries me deeply because there is no telling how many times of which i am unaware that she has

turned away people who were willing to help me. I am trying to win back my freedom and that attorney is only trying to save my life. Saving my life without freedom will leave me still locked up for a crime i did not commit.

Well i am serving notice that i do feel that the Office of the Federal Public Defender no longer and for reasons stated here in this letter has my best interest at hand. I am letting the Court know that if i must go on with this appeal of mine that i no longer want my case to be handle by that Office of the Federal Public Defender. An i am now trying to find a Law Firm that would take my case on. . . .

Seventeen years ago at trial, an attorney for the State of California assigned by the County of Orange sold me like a Slave to the State of California. It is happening to me all over again.

Lawyers protecting lawyers! I have a lawyer who is protecting another lawyer, that trial attorney. An attorney who has lied about somethings under oath. Each and everytime i came across those lies i made it known to lead counsel what those lies were, nothing has been done or even said to him about those lies, when there were opportunities to expose him in his lies, for example. During his deposition, his declaration and when he testify at the evidentiary hearing, just to show the Federal District Court Judge that there is no telling what else he may be lying about. My attorney through her silence allowed the trial

attorney to create an unchallenged impression that he was telling the truth!

An yes it could have been proven that the trial attorney was lying when he said that he had spent a lot of time before trial talking to my Mother and also when he said that he had paid for my Mother and for an Aunt of mine to fly out here to California for my 1987 trial. My attorney did not try to impeach him at all and yes they could have also proven that he had falsified documents. I am talking about a lawyer who didn't even put on a defense for me doing my Capital trial (a death penalty trial) . . .

Yes i am innocent of what i have been forced to deal with all of these years and how can i win when the deck is totally stacked against me! This whole system of justice needs to be torn apart, (ripped asunder) and never ever reconstructed the way they have it rigged up now . . . . . .

Respectfully,

Submitted By:

/s/ Kenneth Clair
Kenneth Clair

Case No: Cv 93-1133 GLT

Mr.Kenneth Clair D-73000
San Quentin Prison
San Quentin,Calif. 94974
2 E/B 88 S

MARIA E. STRATTON, Bar No. 90986
Federal Public Defender
(Maria_Stratton@fd.org)
MARK R. DROZDOWSKI, Bar No. 166669
Deputy Federal Public Defender
(Mark_Drozdowski@fd.org)
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2854
Facsimile: (213) 894-7566

Attorneys for Petitioner
KENNETH CLAIR

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

KENNETH CLAIR, Petitioner, vs. JEANNE WOODFORD, as Warden of San Quentin State Prison, Respondent.	Case No. CV 93-1133 GLT **DEATH PENALTY** **PETITIONER'S RESPONSE TO THE COURT'S ORDER REGARDING MR. CLAIR'S LETTER TO THE COURT**

Counsel for Petitioner submits this response to the Court's order of March 28, 2005, asking the parties to state their positions regarding the letter the Court received from Mr. Clair on March 25, 2005.

Counsel for Petitioner met with Mr. Clair on April 20, 2005 to discuss his letter to the Court and the issues raised in it. After meeting with Mr. Clair, counsel understands that Mr. Clair wants the Federal Public Defender ("FPD") to continue to serve as his counsel in this case at this time. Mr. Clair may re-examine the issue of representation at the conclusion of the proceeding in this Court. Accordingly, the position of counsel for Petitioner regarding Mr. Clair's letter is that the FPD should continue to serve as Mr. Clair's federal habeas counsel at this time.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender.

DATED: April 26, 2005

/s/ Mark R. Drozdowski
MARK R. DROZDOWSKI
Deputy Federal
Public Defender

Attorneys for Petitioner
KENNETH CLAIR

OFFICE COPY ATTORNEY GENERAL

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy Attorney General
BARRY J.T. CARLTON
Supervising Deputy Attorney General
State Bar No. 98930
110 West "A" Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2272
Fax: (619) 645-2271
Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR, Petitioner, **v.** **JOANNE WOODFORD,** Respondent.	**CAPITAL CASE** CV 93-1133-GTL **RESPONSE TO PETITIONER'S COMPLAINT ABOUT COUNSEL** (Filed Apr. 28, 2005)

The Court has requested the parties to respond to Petitioner's, March 16, 2005, letter complaining of the conduct of his counsel. Respondent is of the opinion that, while the matter is one of trial court discretion, nothing in Petitioner's letter requires a change of appointed counsel; indeed, Petitioner does not appear to be requesting one. Petitioner closes his letter by stating that he is searching for his own counsel. Even so, there does not appear to be any basis for this Court to appoint different counsel. Petitioner has failed to show that, the current arrangement is infringing on his due process rights, and in any event, appointment of new counsel would surely delay the case. For these reasons, the court should continue with current counsel.

There is no Constitutional right to appointed counsel in post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990 (1990); *Bonin v. Vasquez*, 999 F.2d 425, 428-429 (9th Cir. 1993). What the trial court does with respect to appointing counsel is within its discretion, providing the interests of justice are served. *Chaney v. Lewis*, 805 F.2d 1191, 1196 (9th Cir. 1986).

Petitioner's complaints as stated in his letter do not appear to reflect any danger that his due process rights are being trammeled. Petitioner complains that his current lawyers have declined to take his case public; that they failed to locate his alleged alibi witness Curtis Lee; that they have divided brief-writing responsibilities between themselves; that they are working to save his life rather than to free

him, and that they failed to challenge certain "lies" told by trial counsel. These complaints do not withstand examination.

Petitioner fails to explain what is wrong with his lawyers acting as lawyers. Petitioner's counsel's job is to represent him in courts of law, not in the court of public opinion. They are doing their job as required (and funded) by this Court. Petitioner fails to explain why it is critical to his due process rights that counsel find and present alleged alibi witness Curtis Lee. As this Court is aware, Mr. Lee's statements to investigator Sandberg were extensively documented, and it is doubtful that Mr. Lee would have anything to add to them twenty years later. The question before this Court is whether trial counsel was ineffective for failing to present Lee at trial, particularly whether counsel should have made greater efforts to find Lee after he disappeared. Petitioner does not explain what light current counsel could have shed on that question by producing Mr. Lee before this Court.

Petitioner also fails to explain what is wrong about co-counsel's dividing up responsibilities in his case. That, if anything, would appear to be an efficient allocation of resources, which would indicate current counsel were being more rather than less effective.

Petitioner also fails to explain what is wrong with current counsel's alleged emphasis on saving his life. Saving Petitioner's life would appear to be a rational top priority for anyone representing him. In

any event, Petitioner's accusation certainly does not find much support in counsel's actions, as they have mounted an extensive attack on the guilt phase of the trial, and, for example, devoted approximately half their closing briefing before this Court to it.

Petitioner also fails to explain how exposing trial counsel's alleged "lies" – about the amount of time counsel spent talking to Petitioner's mother, and whether it was counsel who paid expenses for Petitioner's mother and aunt to attend trial – would have advanced his case in this Court. Even if Petitioner's claims are true, the points seem trivial, and present counsel appear rationally to have concluded that they have more important priorities.

Finally, implicit in Petitioner's request is the notion that new counsel would take a different approach from current counsel. For new counsel to do such a thing would require a complete reevaluation of the case, which in turn would require reinvestigation. If new counsel found new claims, they would necessarily be claims that Petitioner's trial, state habeas, and current federal counsel did not unearth in twenty years' effort, and would require another round of state court and federal court litigation simply to return to the present posture – at which time one supposes Petitioner could write another letter complaining of poor representation. Nothing in Petitioner's letter suggests why this Court should take any action that would so substantially delay this already protracted litigation.

Dated: April 27, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
WILLIAM M. WOOD
Supervising Deputy
Attorney General

/s/ B. J. T. Carlton
BARRY J.T. CARLSON
Supervising Deputy
Attorney General

Attorneys for Respondent

BJC:ah
SD1993FX0004

[Certificate Of Service Omitted In Printing]

DEATH PENALTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

X Priority
X Send
___ Clsd
___ Enter
___ JS-5/JS-6
___ JS-2/JS-3

CIVIL MINUTES – GENERAL

Case No. SA CV 93-1133-GLT Date: April 29, 2005

Title: KENNETH CLAIR v. JEANNE WOODFORD, WARDEN

PRESENT:

HON. Gary L. Taylor, JUDGE [GLT]

Lisa Bredahl
Deputy Clerk

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

None Present
Court Reporter

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: [In Chambers]

PETITIONER'S CORRESPONDENCE REGARDING COUNSEL

(Filed Apr. 29, 2005)

In view of Mr. Clair's attorneys' April 27, 2005 response to the Court's March 28, 2005 request for comment on Mr. Clair's letter, the Court will take no further action on the matter at this time.

Initials of Deputy Clerk LB

MARIA E. STRATTON, Bar No. 90986
Federal Public Defender
(Maria_Stratton@fd.org)
MARK R. DROZDOWSKI, Bar No. 166669
Deputy Federal Public Defender
(Mark_Drozdowski@fd.org)
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2854
Facsimile: (213) 894-7566

Attorneys for Petitioner
KENNETH CLAIR

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

KENNETH CLAIR, Petitioner, vs. JEANNE WOODFORD, as Warden of San Quentin State Prison, Respondent.	Case No. CV 93-1133 GLT **DEATH PENALTY** **PETITIONER'S NOTICE OF FILING OF DECLARATIONS OF PAULINE FLORES, BARBARA PERRY AND OPAL BROWN IN SUPPORT OF HIS HABEAS CORPUS PETITION**

PLEASE TAKE NOTICE that Petitioner hereby files the declarations of Pauline Flores, Barbara Perry and Opal Brown in support of his First Amended

Petition for Writ of Habeas Corpus ("FAP"). *See* Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts; *Lonchar v. Thomas*, 517 U.S. 314, 326, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996) (noting the discretion afforded by Rule 7 to expand the record to facilitate a disposition on the merits); *Brown v. Johnson*, 224 F.3d 461, 467 (5th Cir. 2000) ("If a district court decides to forego a full-blown hearing with plenary presentation of evidence, however, it must 'seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge' of the facts relevant to the claim under consideration.") (footnote omitted).

The declarations support Petitioner's claims for guilt phase relief, including Claim IX (FAP at 102-17); Claim X (FAP at 117-42); Claim XVII (FAP at 181-204); Claim XX (FAP at 220-311) (see *especially* Claims XX.A (FAP at 221-35), XX.C (FAP at 237-40) and XX.E (FAP at 268-75)); and Claim XXIII (FAP at 319-20).

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender.

DATED: June 3, 2005 By /s/ Mark Drozdowski
MARK R. DROZDOWSKI
Deputy Federal
Public Defender

Attorneys for Petitioner
KENNETH CLAIR

DECLARATION OF PAULINE FLORES (AKA CODY, AKA NEITZ) IN SUPPORT OF KENNETH CLAIR'S FEDERAL PROCEEDINGS

I, PAULINE FLORES (aka PAULINE CODY, aka PAULINE NEITZ), declare as follows:

1. I have personal knowledge of the facts stated in this declaration, and if called upon to testify, I could and would testify competently thereto under oath.

2. I testified in the Preliminary Hearing and the Trial of the State of California vs Kenneth Clair case number C-57572. In this trial I testified that I was with Kenneth Clair on November 15, 1984 on the night of the murder of Linda Rodgers.

3. Nine days prior to the date of the murder on November 6, 1984, I was released from the hospital after suffering an critical head injury. The injury occurred on October 30, 1984.

4. My admission diagnosis in the hospital was Head Trauma, Epidural Hematoma, and Skull Fracture. During my hospital stay, the operation that was performed on me was a Parietal burr hole, removal of epidural hematoma, coagulation of branch of the posterior meningeal. On my release from the hospital, I was given 300 mg. of Dilantin to take on a daily basis.

5. After my release from the hospital I spent at least two to three weeks of rehabilitation and did not

come out of my home alone because I could not function normally. I needed help to regain my normal speech. I had to have assistance walking, and I suffered nearly a complete memory loss.

6. My memory was so bad that I did not recognize close family members, and close friends that I would have normally recognized in the past. I did not recognize Barbara Brown (aka Barbara Perry) who was my best friend, Opal Brown, who was like my mother and I had lived with them. I would not have even recognized Kenneth Clair during that period, unless someone were to tell me who he was.

7. I could not have gone out of the house on November 15, 1984. This was only a week after I was released from the hospital. At this point I could not even walk unassisted, I was still suffering memory loss, and I could not have remember a specific date, never less any events in any detail. My parents and my family were very protective, and did not allow me to leave the house during this two to three week unassisted, and I was not physically able to leave on my own.

8. On or about December 26, 1984, I called the Santa Ana Police department requesting the status of an Assault case I had filed against Kenneth Clair to get a status report. On or about December 27, 1984 I met with detective Buckels in regards to this matter. However, detective Buckels did not address the matter that I came to see him on, he started talking to me regarding jewelry and a murder.

9. The police detective took advantage of my mental state at this time, which was a combination of the injuries that I suffered in the accident, and my immediate anger and hatred of Kenneth Clair to manipulate me into assisting them in placing Kenneth Clair at the crime scene and murder of Linda Rodgers.

10. I assisted the police department in this investigation because I felt it was my duty to be a good citizen, plus the fact that the police convinced me that Kenneth Clair had committed the murder.

11. I was never told any information regarding this case at any time regarding another murder suspect who was identified by a child as a white man. I was repeatedly told that Kenneth Clair had committed this murder. I was told over and over again that the date that I was with Kenneth Clair was November 15, 1984. However, I was never sure of that date, or even if I stated it at the time, I was not mentally competent enough to remember the date or even clearly any events that occurred. Addition to that both Opal Brown and Barbara Perry know as a fact that I was not even able to leave the house on that date.

12. I did not intentionally try to mislead the court or any investigators by contradictions in my statements over the years. The truth of the matter is that I did not have vivid memories during that time of any events, dates, or occurrences. I know certain parts of my testimony might have occurred, but as far

as the exact date and order that they occurred I could not remember. However, I now know through people who were there taking care of me, and seeing me on a day to day basis during that period of time that I could not have witnessed anything on that date involving Kenneth Clair and I did not even see Kenneth Clair that day.

13. I sincerely believe that I testified to my best of belief and knowledge at that time, but the people that the defense could have called that knew my where a bouts, condition, and mental capacities such as Opal Brown and my best friend Barbara Perry (Brown) were never called to the stand to testify to my condition.

14. I did not know until just recently that Opal Brown or Barbara Perry (Brown) had even submitted statements to the court that seriously questioned my mental state and my physical condition before and after the murder. They were very close to me, took care of me, and they were there. They did not have memory and physical problems that I did. I have no reason to question either one of their observations because they cared for me.

15. I was interviewed by a defense investigator, C. J. Ford Jr. on or about May 30, 2005. Mr. Ford showed me documentation regarding the statements of Opal Brown and Barbara Perry (Brown), and I had the opportunity to discuss their declarations with them. I had never seen these declarations before. Mr. Ford also went over my testimony and the

contradictions in my testimony and interviews. I was not aware of these contradictions, and after he revealed them to me, they appeared as if I was not being truthful in my account of the events. These contradictions would not have occurred if my memory was stable at that time. I know that some of the occurrences could have happened, but none of these things happened on November 15, 1984.

16. I have thought of these events over the years. It wasn't until recently when Mr. Ford showed me documentation of my testimony and other declarations and documents of the case that I got a clear picture of how I was mislead and used in this matter. It was clear that my mental capacity was impaired at that time, and I should not have even been allowed to testify. I believe the prosecution was aware of my condition and manipulated me into testifying regardless of that, to convict Kenneth Clair.

17. I am glad that I can come forward now. Hopefully it will not be too late to clear up the critical error in my testimony that I was with or even seen Kenneth Clair on November 15, 1984, when it was not only untrue, it was not possible.

18. If I were asked, I would testify to anything that I have said.

I declare under penalty of perjury under the laws of the United States of America and the laws of the State of California that the forgoing is true and correct.

Executed on June 1, 2005

/s/ Pauline Flores Cody Neitz
Pauline Flores (aka Cody, aka Neitz)

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California }
} ss.
County of Orange }

On June 1, 2005 before me,
Date

Marlene L. Pala, a Notary Public,
Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared Pauline Flores Cody Neitz,
Name(s) of Signer(s)

[SEAL] ☐ personally known to me
☒ proved to me on the basis of satisfactory evidence [Valid California Driver's License C1058006] to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he~~/she/~~they~~ executed the same in ~~his~~/her/~~their~~ authorized capacity(~~ies~~), and that by ~~his~~/her/~~their~~ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

/s/ Marlene L. Pala
Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title of Type of Document: [Declaration of Pauline Flores (AKA Cody, AKA Neitz) in support of Kenneth Clair's Federal Proceedings]

Document Date: June 1, 2005 Number of Pages: 3

Signer(s) Other Than Named Above: –

Capacity(ies) Claimed by Signer

Signer's Name: Pauline Flores Cody Neitz

☒ Individual
☐ Corporate Officer – Title(s) _____
☐ Partner –
☐ Limited ☐ General
☐ Attorney-in-Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

RIGHT THUMBPRINT OF SIGNER

Top of thumb here

[Thumbprint]

Signer Is Representing: Pauline Flores Cody-Neitz

DECLARATION OF OPAL BROWN IN SUPPORT OF KENNETH CLAIR'S FEDERAL PROCEEDINGS

I, OPAL BROWN, declare as follows:

1. I have personal knowledge of the facts stated in this declaration, and if called upon to testify, I could and would testify competently thereto under oath.

2. I was contacted by the defense for Kenneth Clair and executed a declaration on or about January 31, 1995.

3. On or about May 31, 2005, I was contacted by C. J. Ford Jr. a defense investigator regarding that declaration.

4. I discussed Pauline Flores's memory and conditions before and after her bicycle accident. I discussed how Pauline lived with me and my daughter around this period of time, and how my daughter witness the accident. I discussed how Pauline was like a daughter to me, and she called me mom.

5. I am still as sure today as I was in 1984, and in my statement in 1995 of Pauline's condition and memory after the accident.

6. I gave Mr. Ford permission to have Pauline Flores contact me in regards to my statement that I issued in 1995.

7. Later that day Pauline Flores contacted me. She was not aware that I had issued the 1995 statement, until it was shown to her by Mr. Ford.

8. We discussed the information and the accident and the past. I believe both Pauline and I conclude that she could not have remembered any specific date at that time, just a week after the accident, and the fact that she was not even capable of leaving the house unassisted for weeks after this accident.

9. Pauline is a good person, and at that time she was like a daughter to me. I do not think that she intended on testifying to information that wasn't factual. I believe that she had serious memory and physical problems at the time and was convinced that she was doing the right thing by testifying. However, the things that I read and understand that she testified to could not happened on that date because Pauline was not able to leave the house unassisted and she had serious memory problems.

10. If I were asked, I would testify to anything that I have said.

I declare under penalty of perjury under the laws of the United States of America and the laws of the State of California that the forgoing is true and correct.

Executed on June 1, 2005

/s/ Opal Brown
Opal Brown

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California }
} ss.
County of Orange }

On June 1, 2005 before me,
Date

Marlene L. Pala, a Notary Public,
Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared Opal Brown,
Name(s) of Signer(s)

[SEAL] ☐ personally known to me
☒ proved to me on the basis of satisfactory evidence [Valid California Driver's License K0275574] to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he~~/she/~~they~~ executed the same in ~~his~~/her/~~their~~ authorized capacity(~~ies~~), and that by ~~his~~/her/~~their~~ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

/s/ Marlene L. Pala
Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title of Type of Document: [Declaration of Opal Brown in support of Kenneth Clair's Federal Proceedings]

Document Date: June 1, 2005 Number of Pages: 1

Signer(s) Other Than Named Above: –

Capacity(ies) Claimed by Signer

Signer's Name: Opal Brown

☒ Individual
☐ Corporate Officer – Title(s)

_____

☐ Partner –
☐ Limited ☐ General
☐ Attorney-in-Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

RIGHT THUMBPRINT OF SIGNER

Top of thumb here

[Thumbprint]

Signer Is Representing: Opal Brown

DECLARATION OF BARBARA PERRY (aka: BROWN) IN SUPPORT OF KENNETH CLAIR'S FEDERAL PROCEEDINGS

I, BARBARA PERRY (aka: BROWN), declare as follows:

1. I have personal knowledge of the facts stated in this declaration, and if called upon to testify, I could and would testify competently thereto under oath.

2. I was contacted by the defense for Kenneth Clair and executed a declaration on or about February 14, 1995.

3. On or about May 31, 2005, I contacted C. J. Ford Jr. a defense investigator regarding that declaration, after being contacted by my mother Opal Brown who told me that Mr. Ford wanted to speak to me.

4. In that conversation, I discussed Pauline Flores's memory and conditions before and after her bicycle accident. I discussed how Pauline lived with me and my mother around that period of time, and how I witness the accident. I discussed how Pauline was like a sister to me, and she was my best friend.

5. I am still as sure today as I was in 1984, and in my statement in 1995 of Pauline's condition and memory after the accident.

6. Mr. Ford made a three way telephone connection to Pauline Flores.

7. Pauline and I discussed the information and the accident and the past. I believe both Pauline and I conclude that she could not have remembered any specific date at that time, just a week after the accident, and the fact that she was not even capable of leaving the house unassisted for weeks after this accident.

8. Pauline was a good person and my best friend. I do not think that she intended on testifying to information that wasn't factual. I believe that she had serious memory and physical problems at the time and was convinced that she was doing the right thing by testifying. However, the things that I read and understand that she testified to could not happened on that date because Pauline was not able to leave the house unassisted and she had serious memory problems.

9. If I were asked, I would testify to anything that I have said.

I declare under penalty of perjury under the laws of the United States of America and the laws of the State of California that the forgoing is true and correct.

Executed on June 1, 2005

/s/ Barbara Perry Brown
Barbara Perry Brown

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California }
} ss.
County of Orange }

On June 1, 2005 before me,
Date

Marlene L. Pala, a Notary Public,
Name and Title of Officer (e.g., "Jane Doe, Notary Public")

personally appeared Barbara Perry Brown ,
Name(s) of Signer(s)

[SEAL] ☐ personally known to me
☒ proved to me on the basis of satisfactory evidence [Valid California Driver's License N9891554] to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he~~/she/~~they~~ executed the same in ~~his~~/her/~~their~~ authorized capacity(~~ies~~), and that by ~~his~~/her/~~their~~ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

/s/ Marlene L. Pala
Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title of Type of Document: [Declaration of Barbara Perry Brown (aka Brown) in support of Kenneth Clair's Federal Proceedings]

Document Date: June 1, 2005 Number of Pages: 1

Signer(s) Other Than Named Above: –

Capacity(ies) Claimed by Signer

Signer's Name: Barbara Perry Brown

☒ Individual
☐ Corporate Officer – Title(s)

_____

☐ Partner –
☐ Limited ☐ General
☐ Attorney-in-Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

RIGHT THUMBPRINT OF SIGNER

Top of thumb here

[Thumbprint]

Signer Is Representing: Barbara Perry Brown

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 93-1133 GLT
Title Kenneth Clair v. Jill Brown
Date June 7, 2005
DOCKET ENTRY

X Priority
X Send
Clsd
Enter
JS-5/JS-6
JS-2/JS-3

PRESENT: IN CHAMBERS

HON. GARY L. TAYLOR, JUDGE [GLT]

Lisa Bredahl	None
Deputy Clerk	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:

None

ATTORNEYS PRESENT FOR DEFENDANTS:

None

PROCEEDINGS: Notice to Parties Regarding Late-filed Declarations [(In Chambers)]

(Filed Jun. 7, 2005)

The Court has received copies of declarations by Pauline Flores, Barbara Perry, and Opal Brown, filed in support of the Amended Petition for Writ of Habeas Corpus. Both parties are instructed that the Court considers the papers in this case to be complete and does not wish to receive any additional material. Because the declarants are significant figures in the case,

the Court will review the declarations to determine whether they are likely to affect the Court's consideration of the issues. If and only if the Court believes that these declarations may change the Court's view of the facts, the parties may be requested to submit additional material concerning these declarations. At that time, Respondent may voice any concerns she may have about propriety or substance of these declarations. Until then, there are to be no further filings in this case.

This matter stands submitted for decision.

IT IS SO ORDERED.

[cc: Death Penalty Law Clerk LB]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF DOCUMENT DISCREPANCIES

To: ☒ U.S. District Judge/
☐ U.S. Magistrate Judge Gary L. Taylor

From: Lisa Bredahl, Deputy Clerk

Date Received: June 21, 2005

Case No.: CV 93-1133-GLT

Case Title: CLAIR v WOODFORD

Document Entitled: LETTER TO JUDGE

Upon the submission of the attached document(s), it was noted that the following discrepancies exist:

☐ Local Rule 11-3.1	Document not legible
☐ Local Rule 11-3.8	Lacking name, address, phone and facsimile numbers
☐ Local Rule 11-4.1	No copy provided for judge
☐ Local Rule 19-1	Complaint/Petition includes more than ten (10) Does or fictitiously-named parties
☐ Local Rule 15-1	Proposed amended pleading not under separate cover
☐ Local Rule 11-6	Memorandum/brief exceeds 25 pages
☐ Local Rule 11-8	Memorandum/brief exceeding 10 pages shall contain table of contents
☐ Local Rule 7.1-1	No Certification of Interested Parties and/or no copies

☐	Local Rule 6.1	Written notice of motion lacking or timeliness of notice incorrect
☐	Local Rule 56-1	Statement of uncontroverted facts and/or proposed judgment lacking
☐	Local Rule 56-2	Statement of genuine issues of material fact lacking
☐	Local Rule 7-19.1	Notice to other parties of ex parte application lacking
☐	Local Rule 16-6	Pretrial conference order not signed by all counsel
☐	FRCvP Rule 5(d)	No proof of service attached to document(s)
☒	Other:	Local Rule 83.2.11 No communication with judge by letter

Note: Please refer to the court's Internet website at wwww.cacd.uscourts.gov for local rules and applicable forms.

ORDER OF THE JUDGE/MAGISTRATE JUDGE

(Filed Jun. 24, 2005)

IT IS HEREBY ORDERED:

☐ The document is to be filed and processed. The filing date is ORDERED to be the date the document was stamped "received but not filed" with the Clerk. Counsel* is advised that any further failure to comply with the Local Rules may lead to penalties pursuant to Local Rule 83-7.

Date

U.S. District Judge/
U.S. Magistrate Judge

☐ The document is **NOT** to be filed, but instead **REJECTED**, and is ORDERED returned to ***~~counsel~~** [sender]. ***Counsel shall immediately notify, in writing, all parties previously served with the attached documents that said documents have **not** been filed with the Court.

6/24/05 /s/ Gary L. Taylor
Date U.S. District Judge/
~~U.S. Magistrate Judge~~

* The term "counsel" as used herein also includes any pro se party. See Local Rule 1-3.

CV-104A (12/03) **NOTICE OF DOCUMENT DISCREPANCIES**

RECEIVED

JUN 21 2005

GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

RECEIVED/RETURNED

JUN 24 2005

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA

C. J. FORD PRIVATE INVESTIGATIONS
219 SOUTH BRADFORD AVE., SUITE B
PLACENTIA, CA. 92870
714-203-8370 866-253-7393 714-203-8371
OFFICE (24 hours) FAX
www.cjfordpi.com WORLD WIDE WEB
cjfordpi@adelphia.net E-MAIL

June 20, 2005

Re: Kenneth Clair
CV 93-1133 GLT

Honorable Judge of the United States Court,

My name is C. J. Ford Jr. I am a licensed Private Investigator in the State of California. I felt that I should write you this letter regarding my investigation in this case above prior to your decision. I was hired by Mr. Clair and a indemnitor who was going to pay me for my services because Mr. Clair is indigent. However, the indemnitor backed out of the agreement,

and I chose to continue my work for Mr. Clair "pro bono".

The specific reason that I was hired was that Mr. Clair told me that the Federal Public Defenders (FPD) Office has had his case for 14 years and they never did the investigative work require to find the facts in his case. The first thing that Mr. Clair wanted me to do was to locate Curtis Lee an alibi witness that had not been found by the FPD office. I found Mr. Lee within 30 days of my assignment. I also found out that he worked for Honeywell and advised the FPD office to subpoena his work records.

I was present at the initial Evidentiary Hearing. Matter of fact I believe that my employed began about 60 days before the hearing. At that specific time, Linda Griffis was the head council for Kenneth Clair. She tried to keep me out of the hearings. I understand the reason why she wanted to keep the public out of the hearings but she knew that I was working for Mr. Clair. After the hearing was over, Mr. Clair ask me to continue investigating his claims and to try to prove that he was innocent.

Since then through my investigative work the following things have occurred.

1. I had a taped interview with Curtis Lee. The FPD office has never made contact with Mr. Lee.

2. I interviewed Pauline Flores, Opal Brown, and Barbara Perry. No one has ever interviewed Ms. Brown and Ms. Perry and confronted Pauline Flores with their interviews. They specifically knew Pauline

daily condition after her accident. The FPD office submitted copies of that just recently to the court.

3. I located and found the blood, hair, fingerprint, and physical evidence that was at the scene of the crime. I did this without the assistance of the FPD office. However, I invited them to the viewing of the evidence. I wanted to see if the evidence was preserved properly and if any or all of it could be tested or retested.

The main reason that I am writing the court is that I have discovered that there were fingerprints that did not belong to Kenneth Clair, the victim, or the owners of the house.

If the FPD office would have been trying to investigate into these things, they would have found this out. These prints most likely belong to the real perpetrator that killed Linda Rodgers because they were prints taken off objects at the crime scene.

I am trying to get Patrick O'Sullivan who is an investigator for the Orange County District Attorney's Office and Scott Simmons the DA to run these prints through the FBI data base. These unidentified fingerprints could be the key to this case, plus the DNA that can be done on other evidence that exist.

I would be willing to come into court and make any showing of proof that these prints exist. I have the actual records. This information should have been investigated by the FPD office and should have been part of their briefs. However, as Mr. Clair has indicated to the court is his belief that the FPD office has been paid for 14 years on his case and were not trying

to find evidence to prove his innocence, just to prolong his life.

I am not trying to pass judgment on the FPD office, only that Mr. Clair's suspicions and the facts of this case through my investigation strongly support his position, and also to the fact that he has been wrongfully accused.

I am asking that this court on it's own power have the Orange County District Attorney's office or a Federal organization such as the FBI to run these unidentified finger prints. I think that this would be warranted before the court renders a decision that would be adverse to Mr. Clair, because the FPD office just wanted to concentrate on Penalty issues instead of Guilt issues. These finger prints in themselves could solve this case.

I feel that Federal power would be warranted in this situation because the reason why the Orange County District Attorneys Office and the Santa Ana Police Department have not run these fingerprints are based on ego and the fact that they may have convicted and sentenced the wrong individual. They would rather see Mr. Clair die on "Death Row" then do their job.

As the court knows and has reviewed the evidence. They have never found anything to link Kenneth Clair to the crime scene besides Pauline Flores testimony which has now been recanted. There has never been any physical evidence linking Mr. Clair to the crime scene. The fact that there are unidentified finger prints that exist that have not been properly tested because the FPD office did not investigate

Mr. Clair's case and the DA office is trying to protect their reputation is outrageous.

I am including my investigative report as to obtaining declaration I got from Opal Brown, Barbara Perry, and Pauline. This report also includes the evidence and findings of the unidentified fingerprints. I hope in the interest of justice you consider this report and my findings. I am not connected with the Federal Public Defenders office or the opposition. I am an independent party and submitted my finding in the most timely fashion as I could to this court.

Respectfully submitted,

/s/ C. J. Ford Jr.
C. J. Ford Jr.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No. ~~SA~~ CV 93-1133 GLT

Date: June 30, 2005

Title: Kenneth Clair v. Jill Brown

==========

PRESENT:

HON. Gary L. Taylor , JUDGE [GLT]

Lisa Bredahl	None Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

None Present

ATTORNEYS PRESENT FOR DEFENDANTS:

None Present

PROCEEDINGS: **LETTER FROM DEFENDANT**

[In Chambers] (Filed Jun. 30, 2005)

The Court has received the attached letter from the defendant, requesting a change of counsel.

It does not appear to the Court that a change of counsel is appropriate. It appears that Petitioner's counsel is doing a proper job. No conflict of interest or inadequacy of counsel is shown.

DEATH PENALTY

CB **Initials of Deputy Clerk**

Mr.Kenneth Clair D-73000
San Quentin State Prison
Condemn Row
San Quentin, Calif. 94974
2 E/B 88 S

Case No.CV 93-1133 GLT DateJune 16,005 [sic]
Title Kenneth Clair v. Jill Brown

To: Judge Taylor
Federal District Court

From:Kenneth Clair
Case No. CV 93-1133 GLT

(Filed Jun. 30, 2005)

Dear Judge Taylor,

I finally received your last ordered dated June 7,2005 and before i do on with this letter i would like to let you know that i am not trying to be disrespectful in any kind of way to ward you with me sending another letter to you. I have no other choice but to do so,in light of what has been revealed to me in the last month. An yes i have tried to deal with the situation, the problem within the Federal Public Defender office, but since that first letter of mine to you i have come to find out that the problem is much deeper then i was able to express and reveal to you then.

That first letter to you had to deal with my dissatisfaction of the way the Evidentiary hearing went that was held in your court room, last year in August of 2004 and the total break down of communication between the former lead attorney that was on my case at that time (Linda Griffis). An since then

there has been many more things revealed to me that has created a conflict of interested between myself and the Federal Public Defender office. I am no longer able to trust anybody within that office. Because of all the lies, the deception and the way they manipulative (manipulate) by keeping very important and major information away from me for all of these years that my case have been in that office.

Now i am asking you to remove my case from the Federal Public Defender office and assign it to someone else. I no longer trust that office and i am asking you to do so for the reasons stated below. . . .

1. In my letter dated to you March 16,2005 i spoke about how the F.P.D. office was turning away offers of help and assistance from a group who had wanted to become involved in this battle of mine. How they turned away a reporter would had wanted to do a story on or about the case and those things were done without anyone from the F.P.D. office ever discussing any of that with me.

2. I talked about the messiness of the last two briefs that were filed in your court room. An this was done at such and important stage of my appellate process, like no one really cared and all they had wanted to do was to get it filed and over with.

3.The alibi witness factor (Curtis L.Lee) and the fact that the information was always there for someone to find if they would have just looked.The employee records had been sitting there with the company of Honeywell's with all of the information in them to

locate and track down Mr.Lee. An as i had stated to you in my first letter that i was told by lead counsel that :I need to forget about that, that i need to let the pursuit of Curtis Lee go." Yes the F.P.D. office dropped the ball with there lack of effort to find my alibi witness. Yes i had to go outside of the loop and have and independent Private Investigator "C.J.Ford",to check into things for me, because something wasn't right. An Judge Taylor, even with the information he had found out for me i still had to force them to submit the request seeking an order to service on the Company of Honeywell.

In that first letter of mine to you i had stated that if need be i would be glad to provide more information about this. Yes Judge Taylor it has been revealed to me that whenever i was told by the F,P.D. office that they had locked for my alibi witness, that they were lying to me. The F.P.D. office never did even uncover Mr.Lee arrest recorder and yes he was arrested in the same county that the Federal Public Defender office is in that is L.A. county.. They never tried to find Mr.Lee and it is nothing they could tell me other wise.

I had a friend of mine to go on line to one of x those companies who claim that they could find anyone you are looking for and for $9.95 all i had to give them was a name and a location (and we always knew where Mr.Lee, was from) and they sent me a list of six individual's by the name of Curtis L. Lee from Minn. and yes he was one of them. Again they never looked for that alibi witness of mine and here they

have been paid hundred's of thousand of dollars to work on this case.

So i kept the press ure (pressure) at than until they had finally sent someone to where Mr.Lee, was living at to try and track him down. From what i was told that he was in a recovery center some 68 miles from where they were and they didn't even bothered to check, instead came home because it was cold. But i kept the pressure on them until they sent that same person back for a second time. That person was Debra Garvey, the lead federal investigator out of that office! This time they were very rude and disrespectful towards Mr.Lee's, Mother, tried to force their way into her home, because she was old,by trying to push through the door, with that old lady standing behind it. At that time the family no longer wanted to have anything at all to do with the F.P.D. office. Judge Taylor, that was done for a reason and please bare with me i am about to get there.

So i gave C.J.Ford, the outside investigator the go ahead to make contact With Mr.Lee. He did and he had to do so by phone, i wasn't able to have him to fly out to the witness to talk to him face to face and no i am not able to get my legal team to pay for that either. It only took Mr.Ford, less then six months to find him and talk to him and to this very dated of June 16,2005 no from my legal team from the federal public defender office has went out to talk to the guy and again no they will not pay for the outside investigator x C.J.Ford, to either fly back there by himself or with one of them, so the guy could finally be talked too.

One may ask why is all of this going on the way it is? Well the lead investigator from my legal team, out of the office Of The Federal Public Defender summed it all up in her statement to one of the potential defense witness of this case of mine.

> "We were only fighting for him to have the chance to die a natural death in prison rather then being executed,". . . .

That is why none of that has been done and will not be done by that office and why i am asking that my case be removed from that office! An that is why they kept information away from me and would not send me copies of the investigative files that had to deal with the guilt phase investigation they lead me to believe they were doing. Because they knew what it would reveal to me and that was they weren't doing much of anything in that area at all.

Yes the whole office knew that this investigator made such a statement to a witness she had went out to interview, because she forward the e-mail to the legal team and the attorney that has been assigned as lead counsel to the case now, was with her on that day! An this was a statement that was made August 8,2001! An by her being bold enough to say that to a ~~xx~~ witness and bold enough to put it in an e-mail that was sent to everyone, i would say that is not the first timeshe has made such a statement about this case she was working on. That is why none of the investigator's ever came up ~~xx~~ (To) me about any parts that

had to do with the guilty phase of this trial of mine or the appellate guilt phase investigation. . . .

4. My case has been in Federal Court for the last 12 or 13 years and with the same office for the last ten years or so and for the first time anyone out of the office ever went down and looked at the evidence that was collected from the crime scene. On May 25,2005 that anyone from federal public defender office ever went down to the court house in Orange County or to Santa Ana Police department to look at the evidence. An they only went down there because i had requested them to go down there.

The meeting was set up by C.J.Ford, a Private Investigator, one who is outside of the system, the loop that i am trapped in and being sold out once again by. An the reason C.J.Ford, set up this meeting with the D.A. office of Orange County, Santa Ana Police department and at my request my legal team, because he had read a report that mention of some unknown fingerprints (fingerprints) that match anyone. Not the victim, none of the other too adult's that lived in the house and for sure they didn't match me. Plus he also found out that there was other evidence that had never been test and no one down there reviewing this evidence with him knew why it had not been test in all of these years. An as i do sat here typing out this to you, to this dated 06/16/05 no paper work of any kind have been submitted to the Federal Court(to you) for dna testing or to even seek a court order to have those unknown prints ran through the F.B.I. databank. Santa Ana, D.A. office and Police department

stated in the report that the unknown prints were ran ~~xxxxx~~ against 30-high-profile-known-suspect's and no match was found. Those were like the odds of one trying to win the lottery.. As you know in August of last year (2004) i had and evidentiary hearing in your court dealing with both the guilt and penalty chase of this injustice that has been carried out against me. An for the life of me i can not understand why no one from my legal team ever went down to the court house in Orange County and reviewed the evidence that was collected from the crime scene, of this case. An one may wonder why? Again no one could have answered that question any better than what the lead investigator of my legal team stated."We were only fighting for him to have the chance to die a natural death in prison rather then being executed,". She had predetermine in her mind that i was guilty as charged and that she didn't see in need for her and or anyone else on the team to do a guilt phase investigation, like they should have do so. With this letter i am enclosing the only copy of that e-mail Debra Garvey had sent out to the rest of the legal team, so that you can read it for yourself.

The office of the federal public defender can't even fall back on the excuse that the statement was made in order to get the witness to open up and talk to them, because it was stated that"Mark and i had decided not to push her on much and didn't ask her about drug use in their (their) house, ect., the interview was over with and they weren't looking to get anymore information out of her. They didn't go out there

seeking any information any way and that was there way of making sure to discourage anyone from wanting to became involved anyway and i am sure that if C.J Ford was to go out and talk to that same person he would get alot of information out of her.

For the last twenty plus years C.J.Ford is the only person to come x along who wants to do a full investigation on this case and get to the bottom of it and do two things to prove that i didn't commit this crime and to solve it.

The outside investigator who is working on my case, he is doing so for free and the fact that there is no funds he has done a good job, the best that has been done in the last twenty years. Yes there are alot of things that he had wanted to do and i would have liked for him to do as well, but by there not being any funds a lot of short cuts had to be made and those who are being given all of the funds to do a full investigation on this case of mine, they did everything to keep from doing one, they never had the intentions on doing one! An from reading their files and reports they never followed up on anything that had to do with the guilt phase of the investigaxxtion, but they went all out on the penalty phase. . . .

With all that has been said here in this letter to you,as well as in that very first letter of mine to you, those are my reasons for asking you to remove my case out of the hands of the federal public defender office. I no longer trust anyone from that office and i do know that they do not have my best interest at

hand, because since they have been working on this case of mine and long before they came along i have been stating and claiming factual innocence's. Thye have lied to me (They have lied to me) and kept very important facts away from me, mislead me to believe that they were on my side and in fact it has turned out to be that the only thing they have been trying to do and that is to win the penalty phase, what they saw as the easy way out.

I no longer care to be represent by the federal public defender office and i have lost all respect for them and i am asking you to please remove them from being the cousel of record (from being the counsel of records)!

Thank you for your time in this matter and i do hope to hear from the Court soon!!!

> My choice and request to be counsel of record and who i Would like to take control of my case,is Larry Marshall, of Stanford University. Yes i really would like for Mr.Marshall (Mr.Marshall). . . .

Respectfully submitted,

Kenneth Clair

/s/ Kenneth Clair

cc: C.J.Ford,Private Investigator

Debra Garvey
08/08/2001 04:06 PM

To Sonia Castaneda, Mark Drozdowski, Linda Griffis, Alane Mabaquiao, Ellen Turlington
cc
bcc
Subject Yesterday Mark and I went out to Palmdale to try to Intervie

Jarrod Hessling. I had an address of:

[redacted]

It was actually the address of Jarrod's sister, Kimberly Hessling now Kimberly Perkins. Jarrod doesn't live with her anymore. When Mark and I first went there we talked to Mr. Perkins, who was at home with their two young daughters, large dog, and his very large beer bottle. Kimberly was at work and Mr. Perkins was on the phone talking with her. We got her to agree to see us at 7 p.m., when she got off work.

When we went back at 7 p.m., Kimberly was very reluctant at first to talk to us at all. She warmed up a little bit, but really didn't seem to remember anything. She remembers a bloody bedroom, and her "Aunt Linda" but not much else. No memory of having told the cops initially that she saw what happened and then changed her mind. She wouldn't dump on Kai, only said that her mother left Kai rather then the other way around. She didn't remember Patricia Strickland or Janine Iwema. Because she was our conduit to her mother and brother, Mark and

I had decided not to push her on much and didn't ask her about drug use in their house, etc.

She declined to give us her mother or brother's phone numbers. She did agree to pass on my name and phone number to them and to ask them to call me. By the end of the interview, I thought there was a chance that might happen.

She initially told me she thought Kenneth was getting out. When I told her we were only fighting for him to have the chance to die a natural death in prison rather then being executed, she wasn't too moved. She said she thought he shouldn't have that option given what he did to Linda Rodgers. Despite that, the interview really ended on a reasonable note.

Mark, anything you want to add or edit?

/deb

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
U.S. COURTHOUSE
312 NORTH SPRING STREET, ROOM G-8
LOS ANGELES, CA 90012

[SEAL]
TERRY NAFISI
District Court Executive
and Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RECORD TRANSMITTAL FORM
FOR SEALED DOCUMENTS

Date: 09/11/2009

To: **U.S. Court of Appeals**
for the Ninth Circuit
Office of the Clerk
95 Seventh Street
San Francisco, California 94103

From: **U.S. District Court**
Central District of California
312 North Spring Street, Room G-8
Los Angeles, California 90012

Attention:
- ☐ Civil
- ☐ Criminal
- ☐ Docketing
- ☐ Record Unit

D C No. 2:93CV01133-CAS Appeals No. 05-99005

Short Title Clair, et al v. Woodford, et al.

Sealed documents in 62 envelopes ☒ under seal

Sealed documents in ____ Boxes ☐ under seal

Other: See Attachment

Note: *Please return sealed documents in same manner as received.*

By D.CASTELLANOS
Deputy Clerk

Acknowledgement: _____ Date: _____

A-22 (09/08) **APPEALS TRANSMITTAL LETTER SEALED DOCUMENT(S)**

S0028
S0033
S0035
S0036
S0037
S0038
S0041
S0044
S0045
S0046
S0047
S0048
S0049
S0050
S0053
S0055
S0057
S0071
S0081
S0082

S0089
S0090
S0092
S0093
S0096
S0099
S0100
S0101
S0104
S0105
S0154
S0162
S0170
S0173
S0174
S0176
S0178
S0181
S0196
S0197
S0218
S0232
S0236
S0241
S0270
S0293
S0326
S0327
S0328
S0329
S0330
S0331
S0332
S0335
S0336

S0337
S0338
S0394
S0429
S0438
S0439
S0442

PETITIONER'S BRIEF

No. 10-1265

In The Supreme Court of the United States

MICHAEL MARTEL, Warden,

Petitioner,

v.

KENNETH CLAIR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BARRY J.T. CARLTON
Supervising Deputy Attorney General
WARD A. CAMPBELL*
Supervising Deputy Attorney General
**Counsel of Record*
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street
P.O. Box 944255
Sacramento, California 94244-2550
(916) 324-5251
ward.campbell@doj.ca.gov
Counsel for Petitioner

CAPITAL CASE
QUESTION PRESENTED

At the end of ten years of capital federal habeas corpus proceedings in the district court, respondent Clair suddenly complained about and sought replacement of his court-appointed public defender with a new appointed lawyer. The district court refused, explaining that "it appears Petitioner's counsel is doing a proper job" and that "[n]o conflict of interest or inadequacy of counsel is shown," and thereupon issued its ruling denying habeas corpus relief. On appeal, however, the Ninth Circuit appointed a replacement lawyer, vacated the judgment, and remanded for further proceedings to allow the new lawyer to raise additional claims for relief. The Ninth Circuit explained that no showing of ineffectiveness of counsel was required, for it was enough that Clair had expressed "dissatisfaction" and had alleged that the public defender was failing to pursue potentially important evidence.

The Question Presented is:

Whether a condemned state prisoner in federal habeas corpus proceedings is entitled to replace his court-appointed counsel with another court-appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional Provisions And Statutes Involved	2
Statement Of The Case	2
A. Clair's Offense: The Murder of Linda Rodgers	2
B. Clair's State Court Trial and Appellate Proceedings	4
C. Clair's Federal Court Proceedings	4
1. Events Leading to Clair's June 16, 2005, Motion for Substitution of Counsel	5
2. Rule 60(b) Proceedings	7
3. Ninth Circuit Proceedings and Opinion	10
Summary Of Argument	13
Argument	17
I. Substitution Of Counsel Is Available In Capital Habeas Corpus Cases Only When The Petitioner Shows Counsel Lacks Statutory Qualifications, Suffers From A Disabling Conflict Of Interest, Or Has Totally Abandoned His Client	17

TABLE OF CONTENTS—Continued

Page

A. Settled Habeas Corpus Principles and Governing Habeas Corpus Statutes Allow Only the Narrowest Grounds for Motions to Substitute Appointed Counsel 18

1. Traditional Habeas Principles Against Protracted and Repetitious Litigation, Strengthened by AEDPA Policy, Require Tight Restrictions on Substitution-of-Counsel Motions under §3599 19

2. Federal Appointment-of-Counsel Statutes, Informed by Habeas Corpus Principles and Policy, Confirm Tight Substitution-of-Counsel Limits for Capital Cases 22

B. Substitution of Counsel Under §3599 Is Limited to Instances in Which Petitioner Diligently Shows Circumstances Amounting to an Actual or Constructive Denial of Representation by Appointed Counsel 33

1. Lack of Statutory Qualifications under §3599 35

2. Conflict of Interest 35

3. Complete Abandonment 36

TABLE OF CONTENTS—Continued

Page

4. The Petitioner Should Request Substitution without Unreasonable Delay 39

5. The District Court is Not Obliged to Inquire About the Petitioner's Request 40

C. Clair's Motion was Insufficient on its Face to Justify Substitution of Counsel 41

II. Even If Substitution Were Not Limited To The Three Circumstances Identified In The State's Argument, The Ninth Circuit's Disposition Of Clair's Motion For New Counsel Still Violated General Habeas Corpus Principles And AEDPA 42

A. The District Court Acted Consistently with the "Interests of Justice" Standard of §3006A 43

B. The Ninth Circuit's Disposition of Clair's Motion was Also Inconsistent with Standards for Substitution of Counsel Applied by this Court and the Lower Courts in the Context of Trial and Direct Review 54

C. Any Error by the District Court did Not Deny Clair His Substantial Rights 58

Conclusion 62

TABLE OF CONTENTS—Continued

Page

Appendix To Petitioner's Brief On The Merits

28 U.S.C. §2111 ..... App. 1

28 U.S.C. §2261 ..... App. 2

Federal Rule of Civil Procedure 60 ..... App. 4

Federal Rule of Civil Procedure 63 ..... App. 6

TABLE OF AUTHORITIES

Page

CASES

Anders v. *California*, 386 U.S. 738 (1967) 36, 37, 39
Arizona v. *Fulminante*, 499 U.S. 279 (1991).....36
Ashworth v. *Bagley*, 351 F.Supp.2d 786 (S.D.Ohio 2005).....61
Barefoot v. *Estelle*, 463 U.S. 880 (1983) 20, 32, 40
Bonin v. *Calderon*, 77 F.3d 1155 (9th Cir. 1996) 19, 44, 46
Bonin v. *Calderon*, 59 F.3d 815 (9th Cir. 1995) 25, 46, 48
Bonin v. *Vasquez*, 999 F.2d 425 (9th Cir. 1993) 29, 32, 44, 45, 46
Brecht v. *Abrahamson*, 507 U.S. 619 (1993).....19, 58
Brookhart v. *Janis*, 384 U.S. 1 (1966).....55
Calderon v. *Thompson*, 523 U.S. 538 (1998).....18, 20
Chaney v. *Lewis*, 801 F.2d 1191 (9th Cir. 1986)...23, 44
Clair v. *Ayers* (Case Nos. 05-99005, 08-75135).....1
Clair v. *Brown* (Case No. CV 93-1133 GLT).....1
Coleman v. *Thompson*, 501 U.S. 722 (1991) 22, 48
Cornell v. *Nix*, 119 F.3d 1329 (8th Cir. 1997).....60
District Attorney's Office for the Third Judicial District v. *Osborne*, ___ U.S. ___, 129 S.Ct. 2308 (2009).....23, 33
Duncan v. *Walker*, 533 U.S. 167 (2001).....27
Evans v. *Chavis*, 546 U.S. 189 (2006) 20
Felker v. *Turpin*, 518 U.S. 651 (1996) 18, 19
Florida v. *Nixon*, 543 U.S. 175 (2004).....50
Foote v. *Del Papa*, 492 F.3d 1026 (9th Cir. 2007).....55
Franqui v. *Florida*, 638 F.3d 1368 (11th Cir. 2011) 29
General Dynamics Corp. v. *Superior Court*, 7 Cal.4th 1164, 876 P.2d 487 (Cal. 1994) 61

TABLE OF AUTHORITIES—Continued

Page

Gomez v. *United States Dist. Ct. for Northern Dist. of California*, 503 U.S. 653 (1992) 21
Gonzalez v. *Crosby*, 545 U.S. 524 (2005).....20, 28
Harbison v. *Bell*, 556 U.S. 180, 129 S.Ct. 1481 (2009).....23, 25, 31, 32
Harrington v. *Richter*, ___ U.S. ___, 131 S.Ct. 770 (2011).....48
Harris v. *United States*, 367 F.3d 74 (2nd Cir. 2004).....36, 39
Hendricks v. *Zenon*, 993 F.2d 664 (9th Cir. 1993).....47
Herrera v. *Collins*, 506 U.S. 390 (1993).....52
Hickman v. *Taylor*, 329 U.S. 495 (1947).....61
Holland v. *Florida*, 130 S.Ct. 2549 (2010).....*passim*
House v. *Bell*, 547 U.S. 518 (2006).....52
Hunter v. *Delo*, 62 F.3d 271 (8th Cir. 1995).....34
Jackson v. *Ylst*, 921 F.2d 882 (9th Cir. 1990).....55
Johnson v. *Gibson*, 169 F.3d 1239 (10th Cir. 1999).....34
Lawrence v. *Florida*, 549 U.S. 327 (2007).....23, 26
Lewis v. *Lane*, 816 F.2d 1165 (7th Cir. 1987).....39
Lindh v. *Murphy*, 521 U.S. 320 (1997).....26, 28
Mayle v. *Felix*, 545 U.S. 644 (2005).....23
McCleskey v. *Zant*, 499 U.S. 467 (1991).....23, 45
McFarland v. *Scott*, 512 U.S. 849 (1994).....*passim*
McKee v. *Harris*, 649 F.2d 927 (2nd Cir. 1981).....55
Mickens v. *Taylor*, 535 U.S. 162 (2002).....33, 35, 40
Murray v. *Delo*, 34 F.3d 1367 (8th Cir. 1994).....34
Murray v. *Giarratano*, 492 U.S. 1 (1989).....22, 37
Newman v. *Graddick*, 696 F.2d 796 (11th Cir. 1983).....61

TABLE OF AUTHORITIES—Continued

Page

Ohio Adult Parole Authority v. *Woodard*, 523 U.S. 272 (1998) 22
Pennsylvania v. *Finley*, 481 U.S. 551 (1987) ..... *passim*
Penson v. *Ohio*, 488 U.S. 75 (1988) 37
People v. *Clair*, 2 Cal.4th 629, 7 Cal.Rptr. 2d 564 (1992) 4
People v. *Kelling*, 151 P.3d 650 (Colo. 2006) 56
People v. *Marshall*, 13 Cal.4th 799 919 P.2d 1280 (1996) 49
People v. *Olivencia*, 204 Cal.App.3d 1391, 251 Cal.Rptr. 880 (Cal.App. 1988) 56
People v. *Roldan*, 35 Cal.4th 646, 110 P.3d 289 (2005) 22
People v. *Taylor*, 160 Cal.App.4th 304, 72 Cal.Rptr. 3d 740 (2nd Dist. 2008) 39
Plumlee v. *Masto*, 512 F.3d 1204 (9th Cir. 2008) (en banc) 55
Post v. *Bradshaw*, 422 F.3d 419 (6th Cir. 2005) 29
Rhines v. *Weber*, 544 U.S. 269 (2005) 19, 20, 40
Roe v. *Flores-Ortega*, 528 U.S. 470 (2000) 34
Rohan ex rel. Gates v. *Woodford*, 334 F.3d 803 (9th Cir. 2003) 31
Sawyer v. *Whitley*, 505 U.S. 333 (1992) 21
Schell v. *Witek*, 218 F.3d 1017 (9th Cir. 2000) 47, 55, 56
Slappy v. *Morris*, 461 U.S. 1 (1983) 34, 50, 55
Smith v. *Robbins*, 528 U.S. 259 (2000) 23, 35, 37, 53
State v. *Torres*, 93 P.3d 340 (Ariz. 2004) 56
Stevens v. *Navistar Int'l Transp. Corp.*, 210 F.Supp.2d 1031 (N.D.Ill. 2002) 39

TABLE OF AUTHORITIES—Continued

Page

Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 59 v. *Superline*, 953 F.2d 17 (1st Cir. 1992) 60
United States v. *Brumer*, 528 F.3d 157 (2nd Cir. 2008) 22
United States v. *Christian*, 861 F.2d 195 (8th Cir. 1988) 55
United States v. *Declet*, 432 F.Supp. 622 (D.C.N.Y. 1977) 46
United States v. *Frady*, 456 U.S. 152 (1982) 58
United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006) 37
United States v. *Lane*, 474 U.S. 438 (1986) 58
United States v. *Moore*, 159 F.3d 1154 (9th Cir. 1998) 39, 55
United States v. *Nixon*, 418 U.S. 683 (1974) 61
United States v. *Padilla*, 819 F.2d 952 (10th Cir. 1987) 55
United States v. *Rich*, 141 F.3d 550 (5th Cir. 1998) 19
United States v. *Rivera-Corona*, 618 F.3d 976 (9th Cir. 2010) 54
United States v. *Smith*, 282 F.3d 758 (9th Cir. 2002) 47, 56
United States v. *White*, 174 F.3d 290 (2nd Cir. 1999) 21
Wainwright v. *Witt*, 469 U.S. 412 (1985) 48
Walker v. *Martin*, ___ U.S. ___, 131 S.Ct. 1120 (2011) 52
Ward v. *Norris*, 577 F.3d 925 (8th Cir. 2009) 29
Wheat v. *United States*, 486 U.S. 153 (1988) 34, 35
Wilson v. *Parker*, 515 F.3d 682 (6th Cir. 2008) 40, 56
Woodford v. *Garceau*, 538 U.S. 202 (2003) 20

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS

United States Constitution
Sixth Amendment ..... *passim*

STATUTES

18 U.S.C.
§3006A ..... *passim*
§3006A(a)(2) 25
§3006A(c) 25
§3006A(d) 25
§3599 ..... *passim*
§3599(a)(2) 10, 25
§3599(c) 25
§3599(e) 11, 25, 31
§3599(g)(1) 25

28 U.S.C.
§1254(1) 1
§2111 ..... 2, 58
§2244 ..... 2, 20, 30
§2254 ..... 2, 18, 23, 27, 28
§2254(h) 24, 43
§2254(i) ..... *passim*
§2261 ..... 2, 26
§2261(e) 27, 29, 30

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (formerly codified at 21 U.S.C. §848(q)) 23, 27
Anti-Terrorism and Effective Death Penalty Act [AEDPA] ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Federal Rules of Civil Procedure
Rule 60 2
Rule 60(b) ..... *passim*
Rule 60(b)(6) 36
Rule 63 ..... 2, 47

OTHER AUTHORITIES

H.R. Rep. No. 23, 104th Cong., 1st Sess. 10 (1995) 21

OPINIONS BELOW

The unpublished memorandum opinion of the Ninth Circuit Court of Appeals, vacating the district court's denial of respondent Clair's petition for writ of habeas corpus, is captioned *Clair* v. *Ayers* (Case Nos. 05-99005, 08-75135). The unpublished opinion of the district court, denying relief, is captioned *Clair* v. *Brown* (Case No. CV 93-1133 GLT). Both opinions are reproduced in the appendix to the petition for writ of certiorari at Petn. App. 1-6, 21-91.[1]

JURISDICTION

The Ninth Circuit issued its judgment on November 17, 2010, and denied the State's request for re-hearing and suggestion for hearing en banc on January 13, 2011. The State petitioned for certiorari on April 12, 2011, which this Court granted on June 27, 2011. This Court has jurisdiction under 28 U.S.C. §1254(1).

[1] The abbreviation "Petn. App." refers to the pertinent opinions and decisions reproduced in the appendix to the petition for writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment of the Constitution provides in relevant part: "In all criminal prosecutions the accused shall . . . have the assistance of counsel for his defense."

The relevant portions of the following statutes involved in this case—18 U.S.C. §3006A, 18 U.S.C. §3599, 28 U.S.C. §2244, and 28 U.S.C. §2254—are reproduced in the Appendix to the Petition for Writ of Certiorari at Petn. App. 92-102. The relevant portions of 28 U.S.C. §2111, 28 U.S.C. §2261, and Rules 60 and 63 of the Federal Rules of Civil Procedure are reproduced in the appendix to this brief on the merits.

STATEMENT OF THE CASE

A. Clair's Offense: The Murder of Linda Rodgers

In 1984, Linda Rodgers resided, as a live-in babysitter, at the home of Margaret Hessling. Respondent Kenneth Clair was a transient who squatted in a neighboring vacant house. Petn. App. 23.

In early November, Clair was arrested for burglarizing the Hessling house. Clair knew that Hessling's boyfriend was the source of the information leading to his arrest. Petn. App. 23-24.

When Clair was released from jail on November 15, 1984, he met up with his girlfriend, Pauline Flores, and headed to Hessling's house. About a block away, he told Flores to wait for him. Clair entered the house, then beat, stabbed, and strangled Linda to death. He left her bound, half-naked body on a bed with a sexual device between her thighs. Clair departed, taking various items, including jewelry and beer, with him. Petn. App. 24.

Minutes later, Clair caught up with Flores, who had walked away after getting tired of waiting. She noticed blood on his right palm. Clair told her he had finished "beating up a woman" and lied to her about where he got the beer. Subsequently, Flores recorded a conversation with Clair in which he made numerous incriminating statements. Petn. App. 24-25.

During this conversation, Flores told Clair that the police were asking her about the jewelry she had seen him with that night. Clair did not deny having the jewelry, but rather asked Flores, "How come you think I didn't give you none of it?" When she asked him what he had done with the jewelry, he told her he had thrown it away. Flores expressed concern to Clair that she was involved in the crime. He responded that no one could prove that they were there (at the murder scene). Clair advised Flores to make up an alibi and have her parents "cover for you." He asked her how anyone was "gonna prove I was there." Clair assured Flores there were no fingerprints and nobody had seen him enter or leave the house. He also told her she did not "need to know" about what had happened. Flores reminded Clair that she had seen

him come out of the house with "speakers, the jewelry, and the Godammned six pack of Budweiser. That's not fucking funny. You murdered a girl." Clair replied: "Will you leave that alone, please? You don't have to rub that in my motherfuckin' soul." Petn. App. 53-54.

B. Clair's State Court Trial and Appellate Proceedings

Clair was convicted of the first degree murder of Linda Rodgers in 1987. The jury also found, as a "special circumstance," that Clair had murdered Ms. Rodgers during a burglary; but it rejected the special-circumstance allegation that the murder had occurred during an attempted rape. The jury returned a verdict of death. The California Supreme Court affirmed Clair's death sentence in 1992. *People* v. *Clair*, 2 Cal.4th 629, 7 Cal.Rptr. 2d 564 (1992).

C. Clair's Federal Court Proceedings

Clair initiated federal habeas corpus proceedings in 1993 by filing a request for appointment of counsel and for stay of execution. Dist. Doc. 1[2] The court granted both requests. Dist. Doc. 16. Clair filed an initial petition for writ of habeas corpus in 1994. Dist. Doc. 71. After exhausting state remedies in 1995,

---

[2] The abbreviation "Dist. Doc." refers to the district court docket entries for *Clair* v. *Ayers*, 93-01133 reproduced in the Joint Appendix.

he filed an amended petition in the district court that same year. Dist. Docs. 95, 106. In 1998, the district court substituted Ms. Linda Griffis and Ms. Julie Langslet as petitioner's counsel. Dist. Doc. 195. Although the precise date is not clear from the district court's docket, it is undisputed that the district court appointed the Federal Public Defender to represent Clair.

1. Events Leading to Clair's June 16, 2005, Motion for Substitution of Counsel

Clair's counsel successfully moved for an evidentiary hearing and sought discovery. In August 2004, the federal district court conducted a two-day evidentiary hearing regarding five separate issues. The post-hearing briefing was substantially completed on January 31, 2005, and the parties began awaiting the court's decision. Dist. Docs. 374-375, Petn. App. 22-23.

But, on March 16, 2005, Clair sent to the district court a letter stating that he no longer wanted to be represented by the Federal Public Defender. He complained that counsel "displayed a degree of messiness" in the briefing, failed to locate an alibi witness, failed to impeach his trial attorney at the evidentiary hearing, and discouraged others from assisting him and publicizing his case. Clair claimed his counsel were only trying to save his life, rather

than trying to show his innocence and secure his outright release from prison. J.A. 19-25.[3]

Upon receipt of Clair's letter, the district court on March 28 ordered both parties to state their positions regarding Clair's request to relieve counsel. Dist. Doc. 399, J.A. 18. The State's position was that Clair had shown no cause to dismiss counsel. Dist. Doc. 401, J.A. 28-32. The Federal Public Defender advised the court that Clair had met with counsel and that he had agreed that the Public Defender should continue to represent him while purporting to reserve the right to take action later. Dist. Doc. 402, J.A. 26-27. The district court decided to take no further action. Dist. Doc. 400, J.A. 33.

This did not, however, put an end to the matter. By letter dated June 16, 2005, Clair renewed his request to remove the Federal Public Defender as his counsel and asked for appointment of new counsel. Clair's second letter reiterated his prior complaints and added a new one. Clair repeated complaints about the "messiness" of the briefing filed by his counsel, his counsel's rejection of offers to publicize his case, and his counsel's failure to locate an alibi witness named Curtis Lee. But Clair also then claimed that counsel had never examined the evidence collected at the Rodgers crime scene until May 25, 2005, when counsel had met with Orange

---

[3] The abbreviation "J.A." refers to the relevant records reproduced in the Joint Appendix.

County law enforcement at the behest of a private investigator working on Clair's behalf. Clair asserted that there were unmatched fingerprints at the scene and other evidence that had never been tested. He attributed this alleged failure by his counsel to a strategy that focused only on the sentencing phase of his trial. Dist. Doc. 407, J.A. 66-69 [4]

On June 30, 2005, after considering Clair's renewed request, the district court denied it as follows: "It does not appear to the Court that a change of counsel is appropriate. It appears that Petitioner's counsel is doing a proper job. No conflict of interest or inadequacy of counsel is shown." Dist. Doc. 407, J.A. 61. The same day, the district court denied all thirty-nine claims alleged in Clair's petition for writ of habeas corpus. Dist. Doc. 408-409, Petn. App. 20-91.[5]

2. Rule 60(b) Proceedings

Clair's appointed counsel, the Federal Public Defender, filed a notice of appeal from the denial of Clair's petition. Dist. Doc. 412. Meanwhile, Clair filed

---

[4] The court also received and returned without filing a letter on Clair's behalf from a private investigator, C.J. Ford. Dist. Doc. 406, J.A. 53-60.

[5] Significantly, the district court rejected a claim that Clair's trial counsel ineffectively failed to investigate and use the testimony of purported alibi witness, Curtis Lee. The district court also found that Lee's potential testimony was not sufficiently definite to support an alibi. Petn. App. 61.

a pro se notice of appeal from the denial of his motion to change counsel. Dist. Doc. 410. In response to an inquiry from the Ninth Circuit, the Federal Public Defender asserted that there had occurred a breakdown in the attorney-client relationship with Clair sufficient to justify substitution. CA Doc. 4.[6] The Ninth Circuit deemed the Federal Public Defender's response a motion to withdraw. CA Docs. 9, 11; Dist. Doc. 422. The Ninth Circuit granted the motion and appointed Mr. John Grele to be Clair's new counsel. CA Doc. 18.

While Clair's appeal was pending, his new counsel unsuccessfully pursued post-conviction relief from the district court under Federal Rule of Civil Procedure 60(b). [hereinafter Rule 60(b)]. He relied on two grounds: (1) newly discovered evidence and (2) the district court's allegedly erroneous denial of Clair's June 16, 2005, request for new federal habeas counsel. This motion included sealed information never disclosed to the State. Dist. Docs. 424-426, 428-429, 435, 461; Petn. App. 14-19.

The district court declined to entertain the Rule 60(b) motion. It explained, first, that Clair had not specified the relationship of the physical evidence to any claims in his habeas petition or to otherwise articulate its significance. Second, it found that the

---

[6] The abbreviation "CA Doc." refers to the Court of Appeals docket entries for *Clair* v. *Ayers*, 05-99005 reproduced in the Joint Appendix.

district court's previous order denying Clair's motion for new counsel was not a summary denial, but a specific finding that Clair had not justified substitution.[7] The district court described Clair's relationship with the Federal Public Defender as a "friction[ ]." The court noted that Clair was "avoid[ing] the prohibition of claims for inadequate assistance of habeas counsel. . . ." The district court characterized Clair's June 16 request as amounting to no more than a request for new counsel after the case was already under submission. According to the district court, "the only basis for granting the request would be the discovery of new evidence requiring reopening the case. . . ." However, "no new evidence exists. . . ." The district court found no error and no prejudice. Dist. Doc. 435, Petn. App. 14-19.

The Ninth Circuit ordered the district court to consider the Rule 60(b) motion and also whether the State should have access to the sealed filings. CA Doc. 34, Dist. Doc. 440, Petn. App. 12-13. The district court denied the motion on its merits. The court reiterated that Clair failed to explain how any particular testing or investigation would advance any claim in a way that was not done or was not possible in the previous proceedings. "At most, the Court views the motion as a request to retry some claims with a new focus, and

---

[7] The State notes that the district court judge, the Honorable Gary L. Taylor, retired the day after he denied Clair's habeas corpus petition. The judge who heard the Rule 60(b) motions was the Honorable Christina A. Snyder.

the need for finality in judgments strongly militates against granting the request." In light of this conclusion, the district court deemed moot the question of disclosing the sealed filings to the State. Dist. Doc. 447, Petn. App. 8-11.

3. Ninth Circuit Proceedings and Opinion

Clair now appealed the denial of the Rule 60(b) motion. His sealed documents were transmitted to the Ninth Circuit, again without disclosure to the State. Dist. Docs. 454, 461.[8]

On November 17, 2010, over twenty-six years after Linda Rodgers's murder, eighteen-years after the California Supreme Court affirmed Clair's death judgment, and six-years after the district court evidentiary hearing, the Ninth Circuit issued a seven page unpublished per curiam memorandum vacating the denial of Clair's habeas corpus petition and remanding the case to the district court. CA Doc. 134, Petn. App. 1-6. The panel (Pregerson, Reinhardt, & Wardlaw, JJ) held that the district court abused its discretion when it denied Clair's request for new counsel on June 30, 2005. The opinion posited that Clair had a statutory right to counsel under 18 U.S.C. §3599(a)(2) [hereinafter §3599]. But it noted that

---

[8] Clair also filed a second or successive petition with the Ninth Circuit and a protective petition for writ of habeas corpus. The petitions are reproduced in the appendix to the opposition to the petition for writ of certiorari.

although §3599(e) permitted Clair to move for a change of counsel, the statute did not provide a standard to adjudicate that motion. To fill that void, the Ninth Circuit borrowed the "interests of justice" standard for substitution of counsel for non-capital cases under 18 U.S.C. §3006A [hereinafter §3006A] and applied it to Clair's request. The panel assumed that Congress intended for capital petitioners to have the same opportunity as non-capital petitioners to replace counsel. Characterizing the district court's ruling as a denial of Clair's request "without explanation," the panel opined that the district court had failed to ascertain whether the "interests of justice" required new counsel since the court had not inquired into Clair's allegations.

The Ninth Circuit panel found it significant that Clair had sent two letters to the district court complaining about his counsel. The opinion noted that Clair's first letter alleged that his counsel had been inattentive, but that the district court had inquired and Clair had agreed to continue his current representation for the time being. Nonetheless, in the Ninth Circuit's view, Clair's second letter should have also prompted a judicial inquiry because Clair had added a "serious additional allegation" that his counsel had failed to examine and present "important physical evidence" located by a private investigator.[9]

---

[9] It is not clear from the memorandum whether this "important physical evidence" was the evidence referred to in Clair's secret filings with the court.

Without elaboration, the panel speculated that this allegation "implicated the fairness of the proceedings" because the evidence was "potentially of great importance" as Clair's conviction "was based upon circumstantial evidence" and occurred before modern forensic techniques, such as DNA testing. Accordingly, the panel ruled, the district judge should have inquired to determine whether Clair's counsel was providing "meaningful assistance."

The panel acknowledged that Clair was not alleging that the Federal Public Defender was constitutionally ineffective. Nonetheless, it held that the district court had failed to properly exercise its discretion with respect to Clair's statutory right to move for new counsel. According to the panel, the district court's action had precluded the possibility that new counsel could have taken action to incorporate the new evidence into Clair's petition.

In view of its finding that the district court had abused its discretion, the Ninth Circuit panel perceived that its earlier decision allowing the Federal Public Defender to withdraw had created a "conundrum" as to the remedy on remand. Since the district judge who denied Clair's request had retired and new counsel had already been appointed, the Ninth Circuit vacated the denial of Clair's petition and retroactively granted his 2005 motion for new counsel. The appeals court ordered that Clair's new counsel on appeal be treated as if he had been appointed in 2005 and that the district court should consider any appropriate submissions counsel might

choose to make, including motions to amend the petition with claims based on the alleged new physical evidence, as if they had been filed prior to the district court ruling denying Clair's petition for writ of habeas corpus. Petn. App. 6.

SUMMARY OF ARGUMENT

Capital prisoners have a statutory entitlement to counsel when they file petitions for writ of habeas corpus in federal court. They also have the right to move for substitute counsel. The issue in this case is the applicable legal standard when capital inmates request a new attorney on habeas.

1. Clair was convicted in 1987 for murder, the key evidence against him being a recording of his own evasive and incriminating statements. Over eighteen years later on the eve of a dispositive ruling on a federal habeas corpus petition that the Federal Public Defender had litigated on Clair's behalf for over seven years, Clair sought to replace his court-appointed counsel. Clair complained only that the public defender had been inattentive to his case and had declined to scientifically test recently-discovered items from the crime scene. The district court denied the request, explained that Clair's counsel had acted appropriately and that Clair had not shown a conflict of interest or any inadequacy in his legal representation. The district court denied Clair's habeas corpus petition on the same day.

The Ninth Circuit, however, held that the district court abused its discretion when it denied Clair's request for new counsel without further inquiry about his concerns. The panel vacated the judgment denying habeas corpus relief and remanded the case to allow new court-appointed counsel to pursue further remedies, including possibly presenting brand new unspecified claims for relief. In essence, the Ninth Circuit reopened Clair's habeas case and enabled him to present new claims without complying with the rules for successive petitions.

2. The Ninth Circuit's decision was erroneous because Clair's complaints were insufficient to justify substitution of habeas counsel. Clair was not constitutionally entitled to legal representation on habeas corpus or to effective assistance by counsel appointed in his case. However, he was statutorily entitled to representation. For capital cases, Congress has established a special system for the long-term appointment of qualified counsel to prepare and litigate habeas corpus petitions in death penalty cases and to represent condemned inmates in subsequent federal and state actions. Substitution of counsel based merely on disagreement with counsel's performance—or on criticism of counsel's tactics and strategy—is contrary to Congressional intent and inconsistent with this Court's holdings that the Sixth Amendment right to effective assistance of counsel does not apply to collateral review. Also, since these appointments are intended to be continuous and to include representation in state forums, unnecessary

grants of substitution motions threaten to disrupt state proceedings, thus undermining principles of comity and federalism. Further, Clair's last minute change in counsel perversely charted a path for an end-run around the successive-petition prohibition of the Anti-Terrorism and Effective Death Penalty Act [AEDPA], including the limitation on raising new claims under Rule 60(b).

In light of the statutory structure for the appointment of qualified counsel in capital cases, and in view of well-settled principles of habeas corpus jurisprudence culminating in AEDPA reforms aimed at minimizing delay and repetitious federal proceedings, motions to substitute counsel must be limited to ensuring that the capital habeas corpus petitioner receives qualified and functioning counsel. Accordingly, substitution motions should be granted only when such counsel is completely denied. That is, substitution is permissible only where federal counsel fails to meet statutory qualifications, labors under a disabling conflict of interest, or has completely abandoned representation of the client. It should not be based on disagreements between counsel and client regarding strategy and tactics.

Clair never alleged or made the appropriate showing. Instead, he questioned only how his unconflicted and active counsel litigated the case. The Ninth Circuit was wrong to require substitution, and most egregiously wrong in vacating the district court's denial of habeas corpus relief from the state judgment.

3. Alternatively, the Ninth Circuit's decision was manifestly erroneous under the "interests of justice" standard for replacement of counsel in non-capital cases under §3006A. Clair failed to show that substitution of counsel was necessary to prevent a denial of due process in his habeas corpus proceedings since his complaints were either groundless or irrelevant to any claims cognizable in his federal habeas corpus proceedings. As a matter of due process, his statutorily appointed counsel provided him sufficient representation. *Pennsylvania* v. *Finley*, 481 U.S. 551, 559 (1987).

Finally, the Ninth Circuit's decision also anomalously endowed a capital habeas corpus litigant with greater latitude to substitute counsel than that possessed under the Constitution by defendants in criminal trials. For instance, Clair was granted new counsel even though he never alleged that his counsel was constitutionally ineffective even under prevailing Sixth Amendment-based standards for substitution of counsel at trial. Thus, the Ninth Circuit's decision gave more deference to Clair's request than a trial court would be expected to give to a similar request by a defendant at trial—totally contrary to a basic premise of habeas jurisprudence that the trial is the "main event" and that habeas corpus is a "secondary and limited" review.

ARGUMENT

I. SUBSTITUTION OF COUNSEL IS AVAILABLE IN CAPITAL HABEAS CORPUS CASES ONLY WHEN THE PETITIONER SHOWS COUNSEL LACKS STATUTORY QUALIFICATIONS, SUFFERS FROM A DISABLING CONFLICT OF INTEREST, OR HAS TOTALLY ABANDONED HIS CLIENT

Settled habeas corpus policies promoting comity and finality, governing habeas corpus statutes including AEDPA, and the realities of capital litigation lead to the conclusion that a court may substitute habeas counsel under §3599 providing for appointment of counsel in capital cases only when the petitioner promptly seeks substitution and demonstrates that he has been denied his statutory right to counsel because (1) counsel lacks the specific statutory qualifications for appointment, (2) counsel is impaired by a disabling conflict of interest, or (3) counsel has abandoned the client. It is not enough for a petitioner, such as respondent Clair, simply to express disapproval of counsel and counsel's strategy or performance. To allow substitution on such grounds, as the Ninth Circuit erroneously did here, would extend to capital inmates an open invitation to file "Clair Motions" seeking new counsel to raise new claims in derogation of settled restrictions on successive petitions and to impermissibly delay carrying out state-court judgments.[10] Furthermore, it

---

[10] Although this is not an equitable tolling case, petitioners could also use such motions as a tactic to gain additional time to

(Continued on following page)

would be inconsistent with this Court's long-established jurisprudence that habeas prisoners, including capital prisoners, are not entitled to the equivalent of the Sixth Amendment right to effective assistance of counsel.

A. Settled Habeas Corpus Principles and Governing Habeas Corpus Statutes Allow Only the Narrowest Grounds for Motions to Substitute Appointed Counsel

As the Ninth Circuit correctly noted, §3599 contains no explicit standard for substitution of appointed counsel in capital federal habeas corpus proceedings governed by 28 U.S.C. §2254 [hereinafter §2254]. Petn. App. 2-3. Nonetheless, the "statutory and jurisprudential limits applicable in habeas corpus cases," narrowed even more tightly by the policies underlying the habeas reforms enacted in AEDPA, and the unique nature of capital litigation dictate the strictest of standards for motions to replace counsel under §3599. See *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (AEDPA successive-petition restrictions inform exercise of court's discretion to recall mandate in non-AEDPA case); *Felker* v. *Turpin*, 518 U.S. 651, 662-663 (1996) (AEDPA and its successive-petition restrictions inform Court's exercise of its original habeas corpus

---

file petitions for writ of habeas corpus after the expiration of AEDPA's period of limitations.

jurisdiction); *Rhines* v. *Weber*, 544 U.S. 269, 276 (2005) ("Any solution to this problem must therefore be compatible with AEDPA's purposes."); *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993) (Court has filled gaps in habeas statutes by determining whether proposed rule advances or inhibits considerations underlying habeas jurisprudence).

1. Traditional Habeas Principles Against Protracted and Repetitious Litigation, Strengthened by AEDPA Policy, Require Tight Restrictions on Substitution-of-Counsel Motions under §3599

By 1996, an "evolutionary process" of history, judicial precedent, equitable principles, and statutory law, already restricted repetitive habeas filings under the rubric of the "abuse of the writ" doctrine. *See Felker* v. *Turpin*, 518 U.S. at 664. Even before AEDPA, that is, courts vigilantly guarded against procedural stratagems, including motions to relieve counsel, that sought to avoid "abuse of the writ" restrictions on successive petitions. *E.g.*, *United States* v. *Rich*, 141 F.3d 550, 551-552 (5th Cir. 1998) (pre-AEDPA Rule 60(b) motions subject to abuse-of-writ doctrine); *Bonin* v. *Vasquez*, 999 F.2d 425, 428 (9th Cir. 1993); *Bonin* v. *Calderon*, 77 F.3d 1155, 1160 (9th Cir. 1996) (rejecting motion to relieve counsel, same considerations applied to pre-AEDPA petitions under abuse-of-writ doctrine).

AEDPA has only reinforced the federal policy against delay and abuse of the writ. 28 U.S.C. §2244. The purpose of AEDPA is "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, ... and to further traditional policies limiting the writ in view of 'the principles of comity, finality, and federalism'...." *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003), quoting *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983) [citations omitted]; *Holland* v. *Florida*, 130 S.Ct. 2549, 2562 (2010). AEDPA considerations are particularly crucial in fixing the proper judicial response when capital petitioners pursue, as Clair did here, motions for new counsel aimed at re-opening their cases in order to circumvent AEDPA's bar against successive petitions. See *Gonzalez* v. *Crosby*, 545 U.S. 524, 531 (2005) (Rule 60(b) motion to vacate judgment is a successive petition if used to raise new claims); *Calderon* v. *Thompson*, 523 U.S. at 553-554 (motion to recall mandate based on new claims deemed a successive petition).[11]

The proper scope of the writ for habeas corpus must account for the capital case petitioner's unique incentive to delay his federal case and to delay the execution of the state court's judgment. *Barefoot* v. *Estelle*, 463 U.S. at 887-888, 894-895; *Rhines* v. *Weber*, 544 U.S. at 277-278; *Evans* v. *Chavis*, 546 U.S. 189,

---

[11] It is of no consequence that Clair's petition was filed pre-AEDPA. *Calderon* v. *Thompson*, 523 U.S. at 554, 558 (although AEDPA does not govern case, its objects and general habeas principles inform the exercise of judicial discretion).

203 fn. 1 (2006) (Stevens, J., concurring) ("[W]hile prisoners on death row often have an incentive to adopt delaying tactics, those serving a sentence of imprisonment presumably want to obtain relief as promptly as possible."). This Court has repeatedly applied habeas doctrines and rules to protect the State's strong interest in enforcing its judgment against manipulation of court processes by capital petitioners. See, *e.g.*, *Gomez* v. *United States Dist. Ct. for Northern Dist. of California*, 503 U.S. 653, 654 (1992) and cases cited therein; *Sawyer* v. *Whitley*, 505 U.S. 333, 341 & fn. 7 (1992); *McFarland* v. *Scott*, 512 U.S. 849, 858 (1994) (capital petitioners who are dilatory about researching and preparing habeas claims are not entitled to stay of execution). Congress's enactment of AEDPA, including its provisions for expedited review of capital cases, also represents the national Legislature's intent to curtail protracted capital litigation. H.R. Rep. No. 23, 104th Cong., 1st Sess. 10 (1995) ("[C]apital defendants and their counsel have a unique incentive to keep litigation going by any possible means.").

It is also vital to limit the use and abuse of substitution motions in habeas corpus proceedings and capital habeas proceedings because of their tendency to delay litigation. Already ubiquitous in criminal trials, substitution motions will exert a particularly deleterious effect in habeas cases if they were to metastasize there. See, *e.g.*, *United States* v. *White*, 174 F.3d 290, 296 (2nd Cir. 1999) ("It would be an understatement to observe that disputes like the

one between White and [his counsel] arise frequently, and such disagreements often culminate in a defendant's request for substitute counsel."); *People* v. *Roldan*, 35 Cal.4th 646, 681, 110 P.3d 289, 312 (2005) ("Defendants in capital cases often express dissatisfaction with their appointed counsel. . . ."); *United States* v. *Brumer*, 528 F.3d 157, 160 (2nd Cir. 2008) (court must be vigilant that substitution motion is not intended to delay proceedings or disrupt administration of justice).

2. Federal Appointment-of-Counsel Statutes, Informed by Habeas Corpus Principles and Policy, Confirm Tight Substitution-of-Counsel Limits for Capital Cases

In addition, federal statutes governing appointment of counsel reflect Congress's desire to minimize substitution in capital cases. As a matter of constitutional and habeas jurisprudence, condemned prisoners—like ordinary prisoners—are not entitled to representation of counsel in collateral proceedings. Nor are they entitled to effective assistance when counsel is appointed to represent them, or to the "full panoply" of rights that accompany the right to counsel in criminal cases under the Sixth Amendment. *Pennsylvania* v. *Finley*, 481 U.S. at 559; *Murray* v. *Giarratano*, 492 U.S. 1, 12 (Rehnquist, C.J., plurality op.), 14 (Kennedy, J., concurring) (1989); *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991); *Ohio Adult Parole Authority* v. *Woodard*, 523

U.S. 272, 284 (1998); *Smith* v. *Robbins*, 528 U.S. 259, 275 (2000); *Mayle* v. *Felix*, 545 U.S. 644, 664 fn. 8 (2005); *Lawrence* v. *Florida*, 549 U.S. 327, 336-337 (2007); *McCleskey* v. *Zant*, 499 U.S. 467, 495 (1991). Accordingly, capital-case inmates who exercise their statutory entitlement to legal representation should not be entitled to any rights to substitute counsel comparable to the rights of defendants at trial to substitute counsel. See *District Attorney's Office for the Third Judicial District* v. *Osborne*, ___ U.S. ___, 129 S.Ct. 2308, 2320 (2009).

Congress has enacted appointment-of-counsel statutes that operate consistently with a strict standard for replacing counsel in capital habeas cases. Initially, under §3006A, district courts had discretion to appoint counsel in all cases in which convicted state defendants pursued collateral review under §2254. *Chaney* v. *Lewis*, 801 F.2d 1191 (9th Cir. 1986). When Congress amended Section 408 of the Controlled Substances Act as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (formerly codified at 21 U.S.C. §848(q)), however, capital prisoners became statutorily entitled to appointed counsel. *McFarland* v. *Scott*, 512 U.S. 849, 850 (1994). Later, in 2006, Congress moved these capital case provisions to their present location at §3599. *Harbison* v. *Bell*, 556 U.S. 180, 129 S.Ct. 1481, 1485, 1487 fn. 3, 1489 (2009).[12]

---

[12] §3599 and §3006A are not exclusively habeas corpus statutes. Rather, they apply to appointment of counsel at all

(Continued on following page)

In this way, Congress singled out the appointment of counsel in capital collateral cases for unique treatment.

Further, Congress explicitly reiterated distinctive treatment for counsel in capital cases in 1996 when it enacted §2254(h) as part of AEDPA. §2254(h) states:

> *Except as provided in section 408 of the Controlled Substances Act*,[13] in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by §3006A of title 18. [emphasis added].

By this reference to section 408 in §2254(h), Congress manifested its intent to create a separate system of specialized rules for appointment of "qualified" habeas counsel in capital cases. *McFarland* v. *Scott*, 512 U.S. at 854-855. Condemned inmates are absolutely entitled to appointment of counsel under

---

stages of the criminal proceedings and subsequent post-conviction processes.

[13] As already noted, section 408 of the Controlled Substances Act was the original location of the appointment of counsel statute now located at §3599. Obviously, it was a drafting mistake that §2254(h) was not amended to conform to the relocation of the appointment of counsel provisions in 2006.

§3599. Compare §3599(a)(2) with §3006A(a)(2) (discretionary appointments). Moreover, "[c]ounsel appointed to represent capital defendants in postconviction proceedings [under §3599] must meet more *stringent* experience criteria than attorneys appointed to represent noncapital defendants under [§3006A]. . . ." *McFarland* v. *Scott*, 512 U.S. at 854 fn. 2. [emphasis added]; §3599(c). In capital cases, the district court actually appoints counsel and authorizes reasonable investigative expenses prior to the actual filing of the habeas corpus petition, in order to allow time for counsel to investigate claims. *McFarland* v. *Scott*, 512 U.S. at 855-859. §3599 also authorizes higher compensation to counsel in capital cases and higher payments for reasonably necessary ancillary services. See *Bonin* v. *Calderon*, 59 F.3d 815, 837 (9th Cir. 1995); compare §3599(g)(1) with §3006A(d). Additionally, unlike non-capital cases, counsel's appointment in capital cases may extend to state "exhaustion" proceedings and state clemency applications. *Harbison* v. *Bell*, 129 S.Ct. at 1489 fn. 7, 1491 (construing §3599(e).) Finally, while capital petitioners may ask to replace their appointed counsel, Congress has provided that the district court may substitute appointed counsel in non-capital cases in the "interests of justice." Compare §3599(e) with §3006A(c).

The provision for replacement of counsel in §3599(e) does not offer any explicit guidance about when substitution is appropriate. However, Congress's passage of legislation that defined qualifications

for counsel and that contemplated long-term appointments of indefinite duration for post-conviction representation indicates that Congress intended to minimize the necessity and the occasion for substitution of counsel. Also, Congress was undoubtedly aware, when it originally enacted this legislation in 1988, that this Court had already held that there was no right to effective assistance of appointed counsel on habeas. *Pennsylvania* v. *Finley*, 481 U.S. at 559; see *Holland* v. *Florida*, 130 S.Ct at 2561 (Congress is presumed to be aware of prevailing law). Thus, Congress could assume that the professional assistance of appointed counsel under this system would not be subject to attack and would not cause the vacation of an adverse habeas judgment. Cf. *Lawrence* v. *Florida*, 549 U.S. at 337.

Moreover, when Congress adopted AEDPA in 1996, it evinced an intent that a claim of ineffectiveness of counsel would not constitute a sufficient ground for substitution of counsel in habeas cases such as Clair's. First, Congress amended Chapter 153 of Title 28 of the United States Code by adding §2254(i), which codified this Court's holdings that ineffectiveness of habeas counsel is not a ground for habeas relief. See *Lindh* v. *Murphy*, 521 U.S. 320, 326-327 (1997) (explaining differences between Chapter 153 and Chapter 154 of Title 28).

Second, as part of AEDPA, Congress enacted the "Chapter 154" special expedited-litigation procedures for qualifying capital cases. 28 U.S.C. §2261 et seq. As part of Chapter 154, Congress repeated the language in §2254(i) of Chapter 153 that "[t]he ineffectiveness

or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under §2254." 28 U.S.C. §2261(e). However, unlike §2254(i) in Chapter 153, Congress tellingly added the following exception for Chapter 154 cases: "This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings." 28 U.S.C. §2261(e).

This extra sentence in §2261(e) of Chapter 154 represents the only time Congress has spoken to an explicit ground for a motion to substitute collateral counsel. That Congress felt compelled to add this specific crucial exception for substitution motions in separate Chapter 154 cases reflects a legislative intention that claims of ineffectiveness would not ordinarily be grounds for substitution motions under §3599 (or its predecessor, 21 U.S.C. §848(q)), including capital cases not subject to Chapter 154. "Where Congress includes particular language in one section of statute but omits it in another section of same Act, it is generally presumed that Congress acts intentionally and purposely in this disparate inclusion or exclusion." *Duncan* v. *Walker*, 533 U.S.

167, 173-174 (2001); *Lindh* v. *Murphy*, 521 U.S. at 329-336.[14]

Even on its own terms, §2254(i)'s bare prohibition of claims based on ineffectiveness or incompetence of habeas counsel also supports the conclusion that Congress did not intend to allow motions for substitution of counsel under §3599 that are based, like Clair's motion, on a disagreement with counsel's strategic and investigative choices. When Congress enacted AEDPA, it was presumably aware that this Court had already held that there was no constitutional right to effective assistance of post-conviction counsel. *Holland* v. *Florida*, 130 S.Ct at 2561. Thus, because an ineffectiveness claim was already not cognizable as a basis for habeas relief under this Court's controlling precedent, it was unnecessary for Congress to say so. The fact that Congress did say so, in §2254, suggests that it had something more in mind. It is reasonable to infer, therefore, that Congress intended something more—that issues of "ineffectiveness and incompetence" by a petitioner's appointed counsel would not be the subject of litigation in §2254 proceedings, including motions for substitution based on the performance of counsel, and would not be grounds for "relief" from an adverse habeas judgment. See *Gonzalez* v. *Crosby*, 545 U.S. at 532 fn. 5 ("We note that an attack [Rule 60(b)] based on the movant's own conduct, or his

---

[14] Clair's non-AEDPA habeas corpus case, of course, is not an expedited "Chapter 154" proceeding.

habeas counsel's omissions . . . ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably."); *Post* v. *Bradshaw*, 422 F.3d 419, 423 & fn. 1 (6th Cir. 2005) ("Our interpretation of §2254(i) as prohibiting more than just habeas relief for constitutionally ineffective counsel is not only a commonsense reading of §2254(i)'s text, but also avoids an interpretation that renders the provision entirely superfluous."); *Ward* v. *Norris*, 577 F.3d 925, 933 (8th Cir. 2009); *Franqui* v. *Florida*, 638 F.3d 1368, 1374 fn. 9 (11th Cir. 2011); see also *Bonin* v. *Vasquez*, 999 F.2d at 429 (holding in pre-AEDPA case that habeas counsel may not claim own ineffectiveness as "cause" for failure to raise claims in prior petition since petitioner had no right to effective assistance of habeas counsel). This construction of §2254(i) is reinforced by the fact that Congress believed it necessary to include language in its Chapter 154 counterpart, §2261(e), explicitly permitting substitution of counsel based on alleged incompetence or ineffectiveness.[15]

---

[15] This Court's equitable tolling opinion in *Holland* v. *Florida*, 130 S.Ct. at 2563, does not affect this analysis. In *Holland*, the petitioner cited his counsel's failures as "extraordinary circumstances" justifying equitable tolling. The majority opinion noted that "Holland does not argue that this attorney's misconduct provides a substantive ground for relief, cf. §2254(i). . . .". *Id.* at 2563. Holland's claim that he was entitled to equitable tolling was not based just on the ineffectiveness or incompetence of his counsel. Rather, Holland alleged that his lawyer had potentially committed "egregious"

(Continued on following page)

This limitation on substitution motions based on the effectiveness or incompetence of counsel also makes sense in light of settled habeas doctrine, most recently strengthened by AEDPA, that restricts repetitive litigation and otherwise reduces delay in collateral proceedings. Without this limitation, other prisoners like Clair will use substitution motions as pretexts to interrupt the progress of their cases or to reopen them (as Clair has tried to do) with new claims. In the latter circumstance, of course, the prisoner evades AEDPA's strictures on successive petitions. 28 U.S.C. §2244. The Ninth Circuit's decision in this case, which imposed a full-fledged duty of inquiry on judges when inmates complain about their appointed counsel, is the most extreme example of how successful this strategy can be—Clair

---

and "extraordinary" misbehavior that was comparable to abandonment of his client. *Id.* at 2564 and cases cited therein; 2568 (Alito, J., concurring). In short, §2254(i) was not particularly relevant to this Court in *Holland* because the allegations for equitable tolling were not claims of mere incompetence or ineffectiveness. In any event, the *Holland* opinion did not have to consider the specific legislative intent regarding the scope of motions to relieve counsel as represented by the difference in wording between §2254(i) and §2261(e). Regardless of whether ineffectiveness of counsel may justify equitable tolling, Congress has made it clear that it did not intend for such allegations to be grounds for substitution of counsel.

was allowed the chance to redo his case after a district court had already denied his first petition.[16]

Finally, federalism and comity concerns militate in favor of a narrowed scope for substitution motions. This Court has held that counsel appointed under §3599 may also be authorized to represent defendants to exhaust remedies on their claims in state court and to submit clemency applications to state executives. *Harbison* v. *Bell*, 129 S.Ct. at 1489 fn. 7, 1490-1491 ("Subsection (e) [of §3599] emphasizes continuity of counsel."). Multi-jurisdictional, multi-case representation raises the specter that an attorney representing the condemned inmate in a state judicial or executive forum will be vulnerable to substitution motions presented to the federal district judge. A narrow standard for substitution appropriately limits an inmate's opportunities to disrupt pending state actions with motions for substitution in federal court. And a limited scope to substitution motions best serves Congress's intent for maintaining long-term appointments in these cases.

In short, this Court's jurisprudence and the statutory scheme for appointing counsel in capital habeas cases compel a conclusion that a capital

---

[16] This is just an another example of how the Ninth Circuit has elevated the statutory right to counsel in capital habeas cases to a level akin to the Sixth Amendment right to counsel at trial and on appeal. See, *e.g.*, *Rohan ex rel. Gates* v. *Woodford*, 334 F.3d 803 (9th Cir. 2003) (capital petitioner has statutory right to competency to assist appointed counsel).

petitioner's motion to substitute appointed counsel should be limited to grounds narrower than allegations of incompetence or ineffectiveness of counsel. This is congruent with the trial being the "main event," while habeas review is "secondary and limited." *McFarland* v. *Scott*, 512 U.S. at 859; *Barefoot* v. *Estelle*, 463 U.S. at 887. This Court has already held that a statutory right to counsel on habeas does not include a right to effective assistance of counsel. *Pennsylvania* v. *Finley*, 481 U.S. at 558-559. Accordingly, dissatisfaction with counsel can hardly constitute cause for replacement. See *Bonin* v. *Vasquez*, 999 F.2d at 429. Congress has also passed legislation that indicates that allegations of ineffectiveness or incompetence, including instances of dissatisfaction and disapproval of counsel's decisions, will not be adequate grounds for substitution. Furthermore, Congress intended to provide continuous, uninterrupted, long-term representation by qualified counsel for condemned prisoners. *Harbison* v. *Bell*, 556 U.S. at 1491 ("[T]he work of competent counsel during habeas corpus representation may provide the basis for a persuasive clemency application."). A standard limiting the grounds and frequency of substitution motions will further Congress's intent.

B. Substitution of Counsel Under §3599 Is Limited to Instances in Which Petitioner Diligently Shows Circumstances Amounting to an Actual or Constructive Denial of Representation by Appointed Counsel

As explained above, governing principles of habeas jurisprudence and the Congressional scheme for appointment of counsel dictate that substitution motions should be made only on very limited grounds. A substitution motion must not be a vehicle for delaying proceedings, for reopening decided cases, or for otherwise avoiding AEDPA's strictures on successive litigation. It should not incorporate Sixth Amendment concepts of effective assistance or otherwise unnecessarily undermine principles of comity, finality, and federalism. And grounds for substitution must not extend to reasons preempted by Congress's plan for the long-range mandatory appointment of qualified counsel.

A capital petitioner is only entitled to protections adequate to protect the statutory right to counsel. See *District Attorney's Office for the Third Judicial District* v. *Osborne*, 129 S.Ct. at 2320. Therefore, the right to substitution should apply only in those situations not preempted by Congress's statutory plan. Those situations encompass the presumptively prejudicial circumstances that arise when there has occurred the equivalent of an actual or constructive denial of the statutory right to counsel. See *Mickens* v. *Taylor*, 535 U.S. 162, 166-167 (2002) (client is

presumed prejudiced when assistance of counsel is denied entirely or during critical stage of proceedings or when counsel actively represents conflicting interests); *Wheat* v. *United States*, 486 U.S. 153, 159 (1988) (Sixth Amendment circumscribes appointment of counsel in "several important respects"); *Smith* v. *Robbins*, 528 U.S. 259, 287 (2000) (three categories of cases in which prejudice is presumed including "denial of counsel," "state interference with counsel's assistance," and actual conflicts of interest); *Roe* v. *Flores-Ortega*, 528 U.S. 470, 483 (2000) (actual or constructive denial of counsel is presumed prejudicial).

Accordingly, a motion to replace appointed counsel under §3599 should be entertained only when appointed counsel (1) does not meet the statutory qualifications for appointment or (2) has a disabling conflict of interest or (3) has completely abandoned representing the client.[17]

---

[17] Some lower courts have held "that substitution-of-counsel standards applied in cases in which the Sixth Amendment is implicated should apply" to motions to replace counsel under §3599. *Johnson* v. *Gibson*, 169 F.3d 1239, 1253 (10th Cir. 1999); *Hunter* v. *Delo*, 62 F.3d 271, 274 (8th Cir. 1995); *Murray* v. *Delo*, 34 F.3d 1367, 1373 (8th Cir. 1994). However, these opinions are conclusory and lack analysis.

1. Lack of Statutory Qualifications under §3599

A valid reason for substitution is when appointed counsel does not actually meet the statutory qualifications of §3599. Congress enacted comparatively "more stringent" qualification standards to ensure adequate representation in federal court for state capital inmates. *McFarland* v. *Scott*, 512 U.S. at 854 fn. 2. If it turns out that the government has appointed counsel who do not meet those qualifications, they should be replaced because the inmates with those counsel have, in fact, been denied their entitlement to qualified counsel as defined by statute. Cf. *Wheat* v. *United States*, 486 U.S. at 159 ("an advocate who is not a member of the bar may not represent clients. . . .").

2. Conflict of Interest

The second valid basis for substitution of counsel arises when appointed counsel actively represents conflicting interests and the conflict adversely affects the attorney's representation of the inmate. In such cases, counsel will not be able to act as an advocate for the client, and the represented inmate will have been completely denied his or her statutory right to counsel. Conflict of interest claims, of course, are fundamentally different from claims of ineffective assistance of counsel. *Mickens* v. *Taylor*, 535 U.S. at 166-167, 174; *Wheat* v. *United States*, 486 U.S. at 159-163; *Smith* v. *Robbins*, 528 U.S. at 287.

3. Complete Abandonment

The third valid ground for substitution of counsel arises when appointed counsel completely abandons the client. Abandonment is tantamount to a denial of counsel. *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (total deprivation of counsel is automatically reversible); see *Holland* v. *Florida*, 130 S.Ct. at 2568 (Alito, J., concurring); cf. *Harris* v. *United States*, 367 F.3d 74, 77, 81 (2nd Cir. 2004) (habeas lawyer's failure must amount to abandonment through either physical or constructive disappearance to justify granting of Rule 60(b)(6) motion).

The meaning of "abandonment" in the context of legal representation on habeas may be deduced by comparing the basic expectation for appointed counsel on a first appeal as of right with the basic expectation for appointed counsel on collateral review. In the former circumstance, even if appellate counsel determines that a client's appeal-as-of-right case is wholly frivolous, the attorney must still provide a brief to the court and to the client containing references to the parts of the record that arguably support the appeal. The client then has an opportunity to raise any points and the court must examine the record to decide if the appeal is frivolous. *Pennsylvania* v. *Finley*, 481 U.S. at 553, citing *Anders* v. *California*, 386 U.S. 738, 744 (1967). Appellate counsel's failure to fulfill this constitutional entitlement—the *Anders* right—is the equivalent of a denial of counsel on direct review and is presumptively prejudicial. This is not the same as a

claim of ineffective performance of counsel on appeal, which does require a showing of prejudice. *Penson* v. *Ohio*, 488 U.S. 75, 88 (1988); see also *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (differentiating between complete denial of right to counsel of choice and denial of right to effective counsel, since only the latter claims require a showing of prejudice).[18]

On the other hand, as already noted, a statutory right of counsel on habeas corpus does not carry with it the "full panoply" of constitutional rights connected with a constitutional right of counsel on appeal. *Pennsylvania* v. *Finley*, 481 U.S. at 559; see also *Murray* v. *Giarratano*, 492 U.S. at 12 (Rehnquist, C.J., plurality), 14 (Kennedy, J., concurring) (state is not constitutionally required to provide counsel for condemned inmates). This Court explained in *Pennsylvania* v. *Finley* that it was sufficient for appointed state habeas counsel to review the record, consult with the client, and report to the court that there were no arguable issues. 481 U.S. at 553. State habeas petitioners do not have equivalent *Anders* rights of briefing of potential arguable issues and judicial review. A habeas petitioner is entitled only to "an independent review of the record by competent counsel. . . ." *Id.* at 558.

---

[18] This Court, of course, has held that the states have procedural latitude in enforcing the "*Anders*" right. *Smith* v. *Robbins*, 528 U.S. at 275.

Pennsylvania v. *Finley* teaches that habeas counsel does not abandon a client as long as counsel independently reviews the record of the case. Conversely, when a petitioner's lawyer fails to meet this obligation, the result is a complete denial of counsel on habeas. This extreme circumstance, which extends far beyond a counsel's ineffective failure to raise a particular claim or to pursue a particular line of investigation, would justify substitution since this severe dereliction amounts to a complete deprivation of a petitioner's statutory right to counsel on habeas.

A qualified attorney who has no conflict of interest and who does not abandon the client satisfies all the requirements of §3599. By the time §3599 comes into play, the condemned inmate has already had the benefit of state trial, appeal, and habeas proceedings. As Congress has recognized, it is inappropriate for federal habeas procedures to duplicate the already-employed state procedures, and accordingly it is unnecessary to provide capital habeas litigants with the same representation required in state trial and appellate proceedings. Thus, substitution of capital habeas counsel is not appropriate when based on allegations of incompetence or ineffectiveness. Rather, the dereliction must rise to a level of total desertion. Congress designed a system for capital habeas petitioners calculated to minimize the possibility that appointed counsel would abdicate their responsibilities as representatives and advocates for their Death Row clients. *McFarland* v. *Scott*, 512 U.S.

at 854. Qualification standards, higher compensation, reasonable funding, and advance time for preparation of the petition all facilitate assistance of counsel greatly exceeding the standard set in *Pennsylvania* v. *Finley*.[19]

4. The Petitioner Should Request Substitution without Unreasonable Delay

Petitioners also must bring any substitution-of-counsel motion promptly. As noted earlier, substitution motions are frequent sources of trial delay and disruption. See, *e.g.*, *United States* v. *Moore*, 159 F.3d 1154, 1161 (9th Cir. 1998) (evaluating substitution motion includes balancing inconvenience and delay against Sixth Amendment right to counsel). Similarly, the potential for delay is a frequent consideration in capital habeas litigation. *McFarland*

---

[19] Substitution motions limited to abandonment are also consistent with the civil nature of habeas corpus proceedings. *Pennsylvania* v. *Finley*, 481 U.S. at 557; *Harris* v. *United States*, 367 F.3d at 81. The rights of civil plaintiffs with appointed counsel are not the same as the rights of criminal defendants. There is no right to effective assistance of counsel in civil cases. Ordinarily, mere allegations of ineffectiveness will not justify substitution. See *Lewis* v. *Lane*, 816 F.2d 1165, 1169-1170 (7th Cir. 1987) (counsel who did no work on case was substituted); *Stevens* v. *Navistar Int'l Transp. Corp.*, 210 F.Supp.2d 1031, 1032-1033 (N.D.Ill. 2002); *People* v. *Taylor*, 160 Cal.App.4th 304, 72 Cal.Rptr. 3d 740 (2nd Dist. 2008) (reviewing inapplicability of *Anders* to various civil proceedings). Habeas corpus petitioners are entitled to no greater rights than any other civil plaintiffs.

v. *Scott*, 512 U.S. at 858 (stay of execution will be denied if petitioner is dilatory); *Rhines* v. *Weber*, 544 U.S. at 269 (discretion is limited by "timeliness concerns reflected in AEDPA"); *Barefoot* v. *Estelle*, 463 U.S. at 880 (federal habeas cannot be used to delay execution indefinitely). Unlike preconviction trial motions, the equities against inconvenience and delay in a capital habeas proceeding should carry far more weight in comparison to a nonconstitutional statutory right to counsel. Accordingly, as with other motions in capital habeas proceedings, a petitioner's delay in bringing concerns about counsel to the court's attention should be a legitimate consideration of the court in granting or denying the request. This consideration is even more pronounced if a substitution motion appears calculated to avoid AEDPA's restrictions on successive litigation.

5. The District Court is Not Obliged to Inquire About the Petitioner's Request

As Clair's case demonstrates, substitution motions also raise questions as to the duty of the court to inquire regarding a petitioner's complaints or concerns about counsel. Except for particular conflicts of interest, there is no obligation for district court judges to conduct formal inquiries into the reasons for a defendant's request for appointed counsel. *Mickens* v. *Taylor*, 535 U.S. at 168-176; *Wilson* v. *Parker*, 515 F.3d 682, 695 (6th Cir. 2008). In any event, the narrow permissible scope of substitution under §3599 should allow judges to act on any substitution requests by

referring to the record or after conducting a very limited inquiry.

C. Clair's Motion was Insufficient on its Face to Justify Substitution of Counsel

As explained above, Clair needed to show that counsel (1) did not meet the statutory qualifications or (2) was adversely affected by a conflict of interest or (3) had failed to review his record for arguable claims. In other words, Clair needed to prove he had been denied the counsel guaranteed by §3599.

Clair did not make any of these arguments or showings. In fact, as the district court knew, the situation was just the opposite. Clair's counsel had submitted a substantial habeas corpus petition; engaged in discovery; and conducted an evidentiary hearing. Clair's last-minute motion, instead, centered on Clair's ongoing dissatisfaction with his counsel's attitude and his disagreement with their investigative decisions. In essence, he was raising an irrelevant claim of ineffective assistance of habeas counsel. Since Clair was not entitled to effective assistance of habeas counsel, the Ninth Circuit could not vacate the adverse habeas judgment on that ground. Clair's arguments were insufficient to justify substitution of his counsel under §3599.

II. EVEN IF SUBSTITUTION WERE NOT LIMITED TO THE THREE CIRCUMSTANCES IDENTIFIED IN THE STATE'S ARGUMENT, THE NINTH CIRCUIT'S DISPOSITION OF CLAIR'S MOTION FOR NEW COUNSEL STILL VIOLATED GENERAL HABEAS CORPUS PRINCIPLES AND AEDPA

As already shown, Clair was not entitled to new counsel under §3599 and the Ninth Circuit was wrong to vacate the denial of his habeas corpus petition in order to give new counsel a chance to reopen Clair's case with new claims. But, even if, as the Ninth Circuit concluded, the "interests of justice" standard of §3006A applied to Clair's substitution motion, its decision was still erroneous. Clair's disapproval of his counsel and of his counsel's investigative choices still did not entitle him to new appointed counsel. The panel misapplied the "interests of justice" standard when it found that the district court had abused its discretion. Clair's motion did not establish that he needed new counsel in order to protect his due process rights. Moreover, the Ninth Circuit's application of the "interests of justice" standard disregarded habeas doctrine and AEDPA rules limiting the pretexts for repetitive, successive litigation. Nor would he have been entitled to new counsel even if the standards applicable to substitution motions in criminal trials were somehow extended to habeas corpus proceedings. In fact, the Ninth Circuit's disposition was more generous to the habeas corpus petitioner, Clair, than the prevailing

standards would tolerate for a defendant on trial. And, in any event, the Ninth Circuit utterly failed to conduct an appropriate prejudice analysis for nonconstitutional error.

A. The District Court Acted Consistently with the "Interests of Justice" Standard of §3006A

As the Ninth Circuit correctly pointed out, §3599 does not set out a standard for replacement of counsel. To fill that void, the panel appropriated the general "interests of justice" standard for replacement of counsel in §3006A.[20] But, the memorandum opinion misapplied that standard when it held the district court abused its discretion by denying Clair's motion for new counsel.

This Court has never defined or applied the "interests of justice" standard of §3006A for purposes of appointment or replacement of habeas counsel. But

---

[20] Under §2254(h), of course, §3006A does not apply to appointment of counsel in capital cases under §3599. Furthermore, by enacting what is now §3599 even before the passage of §2254(h), Congress had provided that appointment of counsel in capital cases should be treated differently from appointment in run-of-the-mine cases. That said, under a proper analysis, the district court's denial of Clair's substitution motion should still have also been upheld under §3006A. In any event, to the extent that the "interests of justice" standard of §3006A also applies to substitution motions under §3599, that standard should reflect the limits discussed in Argument I of this brief.

the Ninth Circuit has. Prior to the enactment of what is now §3599, and also prior to the passage of AEDPA, the Ninth Circuit dealt with the issue of the discretionary appointment of counsel in a capital case under §3006A. In *Chaney* v. *Lewis*, 801 F.2d 1191 (9th Cir. 1986), a panel held that counsel should be appointed when "the circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations." *Id.* at 1196.

Subsequently, the Ninth Circuit also held that the "interests of justice" standard applied to a motion to relieve counsel in a capital case. But, in light of this Court's opinion in *Pennsylvania* v. *Finley*, the Ninth Circuit also held that the alleged ineffectiveness of federal habeas corpus counsel could not form the basis for a motion to relieve counsel. *Bonin* v. *Vasquez*, 999 F.2d 425, 429-431 (9th Cir. 1993) (rejecting argument "to include Sixth Amendment rights within the Due Process Clause in complex habeas cases."); see also *Bonin* v. *Calderon*, 77 F.3d at 1160 ("To recognize such a claim would . . . 'swallow the rule' that there is no constitutional right to effective assistance of counsel in habeas corpus proceedings."). In particular, the Ninth Circuit pointed out that the impact of a right to effective assistance of counsel on habeas "would be the likelihood of an infinite continuum of litigation in many criminal cases" in which courts would never be able to avoid the merits of ineffective assistance of counsel claims despite the limitations of the "abuse of

the writ" doctrine. *Bonin* v. *Vasquez*, 999 F.2d at 429-430 citing *McCleskey* v. *Zant*, 499 U.S. at 494.

Despite this authority and despite the disclaimer in its memorandum opinion, the Ninth Circuit's disposition of Clair's case depended on Clair's complaints about the way counsel had litigated his case.[21] The panel's analysis went way beyond any "due process" concerns underlying its "interests of justice" standard. As the panel offered by way of explanation, "the district court's failure to exercise its discretion foreclosed the possibility that different counsel, upon proper consultation with Clair, would have taken additional necessary action with respect to prosecuting Clair's habeas petition. . . ." Petn. App. 5. For all intents and purposes, then, the Ninth Circuit's disposition was a rush to judgment on the effectiveness of Clair's prior counsel—precisely the analysis previously forbidden by Ninth Circuit authority and this Court's own jurisprudence.

Moreover, the panel's application of the "interests of justice" standard totally ignored the habeas principles discussed in the preceding argument and

---

[21] The Ninth Circuit opinion tried to shield itself on this point by stating that "Clair's contention, however, was not that his habeas counsel was constitutionally ineffective, but rather that the district court failed properly to exercise its discretion with respect to his request for his statutory right with regard to a change of counsel." Petn. App. 5. No matter how it is couched, however, the panel's reasoning was based on concerns about the effectiveness of Clair's counsel.

followed by the Ninth Circuit in the *Bonin* litigation. To the extent that Clair sought new counsel to pursue new investigations, to potentially amend his first petition with new claims, and to seek an additional evidentiary hearing, the "interests of justice" standard should have also required the panel to consider the countervailing values of finality, comity, and federalism that animate habeas jurisprudence. In particular, the panel did not take into account that its disposition was opening the door in Clair's capital case to additional delay and to raising claims that would ordinarily be limited by AEDPA's successive petition rule.[22] See *United States* v. *Declet*, 432 F.Supp. 622, 623 (D.C.N.Y. 1977) ("interests of justice" under §3006A include right of society to "demand speedy justice.").

An example of the panel's disregard for applicable habeas principles was its peremptory decision to grant Clair new counsel in district court and to potentially undo over a decade of district court proceedings by vacating the earlier denial of his habeas corpus petition. The court rejected the option of remanding Clair's case for a limited inquiry into his complaints to determine if there were even

---

[22] As it was, his new counsel on appeal had already litigated a Rule 60(b) motion. As the district court pointed out, if the motion had not been denied, he would have had to confront whether the motion raised new claims in violation of AEDPA. Petn. App. 15. The Ninth Circuit's decision now allows Clair to avoid AEDPA completely.

grounds for a substitution. *Schell* v. *Witek*, 218 F.3d 1017, 1027 (9th Cir. 2000) (en banc) (evidentiary hearing ordered on substitution claim); *Hendricks* v. *Zenon*, 993 F.2d 664, 671 fn. 2 (9th Cir. 1993) ("limited remand" appropriate regarding substitution of counsel allegations). The panel's rationalization for its choice was the "conundrum" caused by the retirement of the district court judge and the appointment of new counsel for Clair on appeal. But this was a "conundrum" of the court's own creation. There was no reason Clair's case could not have been remanded for a limited inquiry before a different judge, including the new judge already assigned to Clair's case. Fed. Rule Civ. Proc. 63 (judge's inability to proceed). A remand, ordered in the "interests of justice," could have obviated the possibility of unnecessary protracted litigation.

However, a remand was not even necessary. Based on the Ninth Circuit's own narrative of events, it can hardly be said that the district court's decision was somehow implausible, illogical, or unreasonable.[23] Petn. App. 3. The record shows that

---

[23] The Ninth Circuit incorrectly stated that the district court had not explained its decision denying Clair's June 16 request for new counsel. In fact, the record shows that the district court indeed articulated reasons for denying the request. Dist. Doc. 407, J.A. 61, Petn. App. 18. The district court was not necessarily obligated to conduct further inquiry into Clair's allegations or even to state any findings for the record. See, *e.g.*, *United States* v. *Smith*, 282 F.3d 758, 764 (9th Cir. 2002) (failure to conduct inquiry is not always abuse of discretion); *Schell* v. *Witek*, 218 F.3d at 1026 (failure to conduct inquiry is

(Continued on following page)

the conduct of Clair's counsel—filing a petition, doing discovery, and conducting an evidentiary hearing—fully comported with due process. Petn. App. 22-23. *Pennsylvania* v. *Finley*, 481 U.S. at 558-559 (sufficient that statutorily appointed competent habeas counsel conducted independent review of the record and reported no arguable issues).

The district court had earlier inquired into Clair's March 16 letter and had been assured that Clair was willing to let his current counsel continue representing him for the time being. Dist. Doc. 399-400; J.A. 18, 26-27, 33. Just as the district court was about to issue its denial of Clair's petition, it received Clair's June 16 letter renewing his earlier complaints and adding a new one about previously undiscovered physical evidence. The district court denied the request as inappropriate because Clair's counsel appeared to be acting properly and because Clair had not demonstrated that his counsel had a conflict of interest or was inadequate. Dist. Doc. 407, J.A. 61-72.

---

not prejudicial per se). Nor does the Ninth Circuit's opinion convincingly explain why the record of the district court's decision was inadequate. See, *e.g.*, *Wainwright* v. *Witt*, 469 U.S. 412, 430 (1985) (findings not required for denial of challenge for cause); *Coleman* v. *Thompson*, 501 U.S. at 739 (state courts not required to make particular findings); *Harrington* v. *Richter*, ___ U.S. ___, 131 S.Ct. 770, 784 (2011) (unexplained state court denials of habeas corpus petitions). For that matter, nothing prevented the Ninth Circuit from affirming the district court's denial of Clair's motion on any ground supported by the record. *Wainwright* v. *Witt*, at 430-431; *Bonin* v. *Calderon*, 59 F.3d 815, 824 (9th Cir. 1995).

Contrary to the Ninth Circuit's opinion, the district court reasonably could have concluded that there was no need to delay the proceedings in Clair's case for further inquiry as Clair's complaints did not indicate that substitution was necessary to protect his due process rights. The district court was justifiably skeptical of Clair's expressed concerns. For example, Clair complained that his counsel resisted publicizing his case, J.A. 63; but at the same time he admitted that counsel legitimately feared that publicity would antagonize the district court. *People* v. *Marshall,* 13 Cal.4th 799, 863 fn. 15, 919 P.2d 1280, 1317 fn. 15 (1996) (ethical restrictions on publicity regarding adjudicative proceedings). And, of course, generating extraneous publicity was also irrelevant to the merits of Clair's case.

Although Clair also denigrated his counsel's search for alleged alibi witness Curtis L. Lee, J.A. 63-64; the district court's own order denying Clair's petition recounted that Lee "fails as an alibi witness" because "his testimony was not sufficiently definite to provide a solid alibi." Petn. App. 61. Nothing in Clair's letter could have changed the district court's estimate of Lee's worth as a defense witness or of the performance of Clair's lawyers regarding their investigation of Lee as a witness.

Clair inaccurately asserted that counsel's sole strategy in his habeas corpus case was just to save him from the death penalty without also vacating his

conviction.[24] His criticism, however, hinged on a report from his counsel's own investigator about her efforts to locate Jarrod Hessling and her interview with Kimberly Hessling—both guilt-trial-related witnesses. Petn. App. 41, 60. To cajole a reluctant Kimberly to talk, the investigator tried to assure her that "we were only fighting for [Clair] to have the chance to die a natural death in prison. . . ." J.A. 71-72. The district court reasonably could have concluded that Clair either misunderstood the report or was taking the investigator's statement out of context, especially since the investigator was actually reporting about a guilt-trial investigation. On its face, this report contradicted Clair's assertion that his counsel was not trying to also overturn his murder conviction. Plus, petitioner's counsel had raised approximately twenty-three claims challenging Clair's conviction. And the district court's evidentiary hearing, of course, was directed to guilt and penalty phase claims. Petn. App. 31, 59, 74. Clair's critique of his counsel's strategy was, quite apparently, without substance.[25]

---

[24] Of course, if true, counsel's focus on Clair's penalty was not necessarily a poor strategic choice. See *Florida* v. *Nixon*, 543 U.S. 175, 191-192 (2004).

[25] The earlier March 16 letter also indicated that Clair's concerns about his counsel involved a lack, from Clair's standpoint, of a "meaningful" relationship with his lawyer. Thus, his letter referred to an uneasy, but ongoing "working relationship." J.A. 20. But Clair was not entitled to new counsel for such reasons. *Slappy* v. *Morris*, 461 U.S. 1, 13-14 (1983).

Finally, the Ninth Circuit focused on what it deemed a "serious additional allegation" in Clair's June 16 letter that his counsel had failed to examine important untested physical evidence from the scene of Linda Rodgers's murder. In particular, Clair announced in the letter that there were "unknown" fingerprints that did not match his prints or anyone else's in the Hessling house. He also alluded to other unspecified evidence that allegedly had never been tested for DNA. J.A. 67. The Ninth Circuit characterized this "physical evidence" as of potential great importance to Clair's habeas petition because Clair's "conviction was based upon circumstantial evidence, and occurred *before* the advent of DNA testing and other modern forensic techniques." Petn. App. 4 [emphasis added].

The Ninth Circuit, however, misunderstood or greatly exaggerated the significance of Clair's last-minute allegation about new untested physical evidence. To begin with, Clair's conviction was not just a circumstantial evidence case. Rather, the "key" evidence of Clair's guilt was his own tape-recorded statement to Flores in which he incriminated himself and corroborated Flores's testimony against him. Petn. App. 52-54.[26] However, there had never been any

---

[26] Clair probably did not help his case in the district court by submitting belated and incredible declarations from Flores and her friends. The declarations asserted that Flores's medical condition at the time prevented her from being out with Clair on the night of Linda Rodgers's murder. As the district court pointed out, the declarations "prove too much" since they are

(Continued on following page)

physical evidence connecting Clair to the crime scene. The discovery of additional physical evidence that still did not connect him to the crime scene did nothing to undercut the evidence of his own guilt based on his taped conversation with Flores.

Even more importantly, as the Ninth Circuit's own opinion demonstrates, this allegedly new "important physical evidence" was not pertinent to any claim cognizable in Clair's habeas corpus proceeding. As the opinion explains, the discovery of the evidence was important because Clair's trial "occurred *before* the advent of DNA testing and other forensic techniques." Petn. App. 4. That is, the evidence was not relevant to any claims of error occurring at Clair's trial. From the viewpoint of the district court when Clair requested new counsel, this new evidence could be viewed only as relevant to a "freestanding claim" of "actual innocence." But, in light of the record evidence of Clair's guilt, this new evidence could hardly support a valid exoneration claim. See *House* v. *Bell*, 547 U.S. 518, 554-555 (2006). Moreover, Clair could not raise such a claim in federal court, for California provides "available state avenues" to entertain "actual innocence" claims. *Walker* v. *Martin*, ___ U.S. ___, 131 S.Ct. 1120, 1128 fn. 5 (2011) (state habeas corpus); *Herrera* v. *Collins*,

---

inconsistent with Clair's and Flores's taped conversation about what happened that night. Petn. App. 49-50, 63-64.

506 U.S. 390, 414 fn. 14 (executive clemency) (Rehnquist, C.J., opn.), 427 (1993) (O'Connor, J., concurring). Under any standard, Clair's counsel could reasonably choose not to pursue this claim. *Smith* v. *Robbins*, 528 U.S. at 288.

When the "interests of justice" standard is properly viewed in terms of whether substitution was necessary to protect Clair's due process rights, and in light of the habeas jurisprudence and statutory law that should inform the standard, it is easy to see why the district court denied Clair's June 16 request for new counsel. Clair's complaints about counsel were either inaccurate or misplaced. And, as a matter of due process, Clair's counsel had provided him adequate representation. His counsel had filed a substantial petition for writ of habeas corpus, performed investigation and discovery, and then conducted an evidentiary hearing. Petn. App. 22-23. See *Pennsylvania* v. *Finley*, 481 U.S. at 558-559. Clair's counsel had acted appropriately. J.A. 61. Furthermore, the societal interest of justice in finality, including limiting delay and minimizing repetitive litigation, counseled in favor of denying Clair's motion. It follows, therefore, that the district court did not abuse its discretion in deciding that substitution of Clair's counsel was not necessary and the Ninth Circuit should have upheld that decision.

B. The Ninth Circuit's Disposition of Clair's Motion was Also Inconsistent with Standards for Substitution of Counsel Applied by this Court and the Lower Courts in the Context of Trial and Direct Review

If the Ninth Circuit's disposition was truly not based on the ineffectiveness of Clair's appointed counsel—as it claimed—then its decision was inconsistent with the prevailing rules and standards of this Court and the lower courts relating to substitution of counsel at the level of trial and direct review. The Ninth Circuit found that the district court had abused its discretion, even though Clair was not asserting that his counsel was constitutionally ineffective, but only that he was merely disagreeing with counsel about the litigation and investigation of his case. Viewed in this light, the Ninth Circuit's ruling reflected the application of a substitution-of-counsel standard on habeas corpus that, anomalously, is more generous than the standard ordinarily applied at trial and direct review. This difference, of course, is totally unsupportable.

The general rule for motions for substitution of counsel at trial applied by the lower courts is that "[t]he defendant has a right to substitution only upon establishing 'good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which [could] lead . . . to an apparently unjust verdict.'" *United States* v. *Rivera-Corona*, 618 F.3d 976 (9th Cir. 2010) (Fisher,

J., concurring). Substitution motions are considered in light of a threat to the defendant's Sixth Amendment right to effective assistance of counsel. *Schell* v. *Witek*, 218 F.3d at 1026-1027; *United States* v. *Moore*, 159 F.3d 1154, 1158-1159 (9th Cir. 1998). But lower courts also agree that trial defendants are not entitled to substitution of trial counsel merely because they disagree with their counsel's strategic and tactical decisions. *Schell* v. *Witek*, at 1026, citing *Brookhart* v. *Janis*, 384 U.S. 1, 8 (1966); *Jackson* v. *Ylst*, 921 F.2d 882, 888 (9th Cir. 1990); *McKee* v. *Harris*, 649 F.2d 927, 932 (2nd Cir. 1981) ("lack of trust" insufficient); *United States* v. *Christian*, 861 F.2d 195, 197 fn. 2 (8th Cir. 1988); *United States* v. *Padilla*, 819 F.2d 952, 956 (10th Cir. 1987).

This Court has never ruled, however, that trial defendants are otherwise entitled to substitution of counsel except when their attorneys have an actual conflict of interest or fail to serve as active loyal advocates. *Plumlee* v. *Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008) (en banc). Nor has this Court held that "irreconcilable differences" between a defendant and counsel justify substitution. *Foote* v. *Del Papa*, 492 F.3d 1026, 1029 (9th Cir. 2007). Rather, this Court has held that defendants are *not* entitled to a "meaningful relationship" with their appointed counsel. *Slappy* v. *Morris*, 461 U.S. at 13-14; *Plumlee* v. *Masto*, at 1210-1211.

Nor has this Court ever held that a judge has a duty to inquire into the reasons for an indigent

defendant's dissatisfaction with appointed counsel. *Wilson* v. *Parker*, 515 F.3d at 695. Indeed, lower courts do not consider a formal inquiry to always be necessary depending on the nature of the defendant's complaints and the record before the trial judge. See, *e.g.*, *United States* v. *Smith*, 282 F.3d 758, 764 (9th Cir. 2002) (failure to conduct inquiry is not always abuse of discretion); *Schell* v. *Witek*, 218 F.3d at 1026 (failure to conduct inquiry is not prejudicial per se). Ordinarily, the appropriate remedy when a court fails to inquire about a defendant's concerns is a remand for the trial court to make inquiry about a substitution motion. See, *e.g.*, *Schell* v. *Witek*, at 1027; *State* v. *Torres*, 93 P.3d 340, 344 (Ariz. 2004) (and cases cited); *People* v. *Olivencia*, 204 Cal.App.3d 1391, 1400-1401, 251 Cal.Rptr. 880 (Cal.App. 1988) (and cases cited); *People* v. *Kelling*, 151 P.3d 650, 655 (Colo. 2006) (and cases cited).[27]

Measured against these standards applicable to defendants on trial, Clair's request for new counsel failed to justify substitution of counsel. According to the Ninth Circuit, Clair was not challenging the constitutional effectiveness of his counsel. Petn. App.

---

[27] By recounting this case law, the State is not arguing that the Sixth Amendment requires any particular standards or showings for substitution motions at trial or direct review. Rather, for purposes of this alternative argument, the State is simply noting that the Ninth Circuit's decision regarding replacement of counsel on habeas is even more generous than the standards being applied at trial by this Court and the lower courts.

5. Nor did Clair allege a conflict of interest. Yet, even at trial, it would have been a prerequisite to base a substitution motion on the threat that a defendant would otherwise be denied his Sixth Amendment right to effective assistance of counsel. Clair's request thus did not even meet the threshold for a substitution motion at trial. He was not alleging the necessary predicate for substitution, even at the trial level.

The panel opinion also faulted the district court for not inquiring into Clair's allegations that he was discontented by his counsel's alleged inattention to his case and that his counsel had failed to test recently discovered new evidence. But, even in the context of a criminal trial, this Court has never imposed a duty to make an inquiry in these circumstances. No inquiry is necessary when the record before the court demonstrates that substitution was unwarranted. As already explained in the preceding argument, the record was adequate. Clair's claims of "inattention" (not a breakdown in communications or irreconcilable conflict) and his criticism of counsel for not testing the new physical evidence amounted to mere tactical disagreements that would not have justified substitution even in a criminal trial.

Finally, the Ninth Circuit erred in replacing counsel, without even remanding the case for an inquiry in Clair's allegations. This peremptory disposition itself also varied from the generally recognized appropriate remedy of remanding the case

to conduct such an inquiry rather than simply reversing the judgment.

The basic premise of our habeas corpus jurisprudence is that the trial is the "main event" and that habeas review is "secondary and limited." *McFarland* v. *Scott*, 512 U.S. at 859. Totally contrary to this Court's precedents and guidance, the Ninth Circuit set a "lower hurdle" for Clair on habeas than would have existed for him at trial or on direct appeal. See *United States* v. *Frady*, 456 U.S. 152, 166 (1982). The Ninth Circuit elevated Clair's motion for substitution of habeas counsel to a level above a motion for substitution at trial. Thus, the Ninth Circuit's decision accomplished the feat of being inconsistent with both habeas corpus jurisprudence and substitution-of-appointed-counsel case law. Since Clair's request could not have succeeded at the "main event," it could hardly justify new counsel at his post-conviction sequel.

C. Any Error by the District Court did Not Deny Clair His Substantial Rights

Even if the district court committed error when it denied Clair's statutory request for new counsel, the error was non-constitutional in nature. Therefore, the panel was obligated to determine whether it affected Clair's substantial rights. 28 U.S.C. §2111; *Brecht* v. *Abrahamson*, 507 U.S. at 631 (citing *United States* v. *Lane*, 474 U.S. 438 (1986)). But the record makes it

clear that the refusal to replace counsel did not prejudice Clair.

The Ninth Circuit faulted the district court for not inquiring into Clair's complaint that his counsel failed to investigate and test newly discovered evidence. The panel stated that the new evidence was potentially important because Clair's trial had occurred before DNA testing and other forensic techniques were available to test the evidence. The Ninth Circuit then basically presumed that counsel had failed to meaningfully investigate this new evidence and held that Clair's request for new counsel should be granted without further inquiry.

The only indication that the panel even considered prejudice is the cryptic footnote 1 in its memorandum opinion. There the panel noted that Clair's new counsel on appeal had raised, in an unsuccessful Rule 60(b) motion, issues related to the discovery of the new evidence. The panel disregarded the Rule 60(b) proceedings because, it said, they offered only a "limited opportunity" to repair defective decisions compared with pre-decision motions to amend or modify petitions. Petn. App. 5-6 fn. 1. Yet the panel did not explain why the district court potentially might rule differently if confronted, in a motion to amend the petition, with the same evidence and claims it had found insufficient to justify relief under Rule 60(b). The district court's two Rule 60(b) decisions scathingly dismissed Clair's "new evidence" claims. Petn. App. 8-10, 14-18. Furthermore, since Clair's showing was directed at a "freestanding claim

of actual innocence," and since he had not demonstrated that such a claim would be cognizable in his case, he was not entitled to reopen his case under Rule 60(b). *Cornell* v. *Nix*, 119 F.3d 1329, 1335 (8th Cir. 1997). The district court that denied Clair's Rule 60(b) motion was not obligated to vacate the judgment denying his petition if doing so would be an empty exercise. *Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 59* v. *Superline*, 953 F.2d 17, 20 (1st Cir. 1992) (and cases cited). The district court's denial of Clair's Rule 60(b) motion based on that same newly discovered evidence demonstrated that the district court's earlier denial of Clair's motion for new counsel did not deprive him of a "substantial right." Nothing in the district court's analysis of the Rule 60(b) analysis indicated that an attempt by Clair to amend his petition would be anything but futile—no matter who was representing him.

In addition, the Ninth Circuit opinion omitted the fact that the district court also had reexamined the earlier denial of Clair's substitution motion. The district court explained that the only reason for granting Clair's request for new counsel, after his case was under submission, would have been "new evidence" justifying a reopening of the proceedings. Since no "new evidence" existed, there was no justification for substitution of Clair's counsel. Petn. App. 19. The Ninth Circuit opinion does not explain

why this finding by the district court should not have disposed of any question that Clair was not prejudiced by the earlier decision not to replace his counsel in 2005.[28] The record demonstrates that the district court's denial of his motion for new counsel under §3599 did not deny Clair's substantial rights.

---

[28] The State was hampered in arguing the relevance of the district court's denial of Clair's Rule 60(b) motion due to a lack of access to sealed documents that were submitted to both the district court and the Ninth Circuit. J.A. 74-76. Although the district court essentially found Clair's showing regarding his allegedly new evidence to be unclear, unspecific, and unpersuasive, the State was not able to fully utilize the information that supported the district court's determination and also, inferentially, that demonstrated that Clair was not prejudiced by the earlier denial of his motion for new counsel. This secrecy denied the State its appropriate role in the adversarial process. *United States* v. *Nixon*, 418 U.S. 683, 708-709 (1974); *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947). It denied the People, in general, access to knowledge and information about federal court review of state court judgments. See, *e.g.*, *Newman* v. *Graddick*, 696 F.2d 796, 801 (11th Cir. 1983); *Ashworth* v. *Bagley*, 351 F.Supp.2d 786, 790 (S.D.Ohio 2005). There was no reason for this material to remain concealed since California courts could deploy "an array of ad hoc measures from their equitable arsenal" to protect any disclosures by Clair in the event of a retrial. *General Dynamics Corp.* v. *Superior Court*, 7 Cal.4th 1164, 1191, 876 P.2d 487 (Cal. 1994).

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BARRY J.T. CARLTON
Supervising Deputy Attorney General
WARD A. CAMPBELL*
Supervising Deputy Attorney General
**Counsel of Record*
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street
P.O. Box 944255
Sacramento, California 94244-2550
(916) 324-5251
ward.campbell@doj.ca.gov
Counsel for Petitioner

Page

Appendix To Petitioner's Brief On The Merits

28 U.S.C. §2111 ..... App. 1

28 U.S.C. §2261 ..... App. 2

Federal Rule of Civil Procedure 60 ..... App. 4

Federal Rule of Civil Procedure 63 ..... App. 6

28 U.S.C. § 2111

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

28 U.S.C. § 2261

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) Counsel. – This chapter is applicable if –

(1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and

(2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record –

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

Federal Rule of Civil Procedure 60

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

Federal Rule of Civil Procedure 63.

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

RESPONDENT'S BRIEF

No. 10-1265

Supreme Court, U.S.
FILED
NOV 8 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICHAEL MARTEL, WARDEN,

Petitioner,

v.

KENNETH CLAIR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

JOHN R. GRELE
LAW OFFICES OF
JOHN R. GRELE
149 Natoma Street
Third Floor
San Francisco, CA 94105

DAVID W. FERMINO
149 Natoma Street
Third Floor
San Francisco, CA 94105

SETH P. WAXMAN
Counsel of Record
EDWARD C. DUMONT
CATHERINE M.A. CARROLL
ARON B. GOETZL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022

QUESTIONS PRESENTED

1. Whether the legal standard guiding the discretionary replacement of counsel appointed to represent a capital defendant under 18 U.S.C. § 3599 is whether, under all the circumstances, replacement is warranted "in the interests of justice."

2. Whether the court of appeals correctly found an abuse of discretion in this case, where the district court denied respondent's request for replacement of counsel without making any inquiry into the circumstances underlying the request.

3. Whether, where new counsel had already been appointed at the outset of respondent's appeal (without objection by the State), the court of appeals properly tailored its remedy by remanding the case to allow the district court to decide whether respondent should be permitted to amend his habeas petition or supplement the record before the entry of judgment.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

STATEMENT 4

A. Clair's Trial And Conviction 4

B. Clair's Federal Habeas Petition 5

C. Clair's Requests For New Counsel 6

D. Clair's Appeal And Further Proceedings 10

E. The Court Of Appeals' Decision 14

SUMMARY OF ARGUMENT 15

ARGUMENT 18

I. THE "INTERESTS OF JUSTICE" STANDARD GOVERNS MOTIONS FOR SUBSTITUTION OF APPOINTED COUNSEL IN CAPITAL PROCEEDINGS 18

A. The "Interests Of Justice" Standard Is Consistent With The Structure, History, And Purpose Of Section 3599 19

B. The State's Proposed Standard Has No Basis In The Text, History, Or Purpose Of Section 3599 24

II. THE COURT OF APPEALS CORRECTLY APPLIED THE ABUSE-OF-DISCRETION STANDARD 33

III. THE REMAND ORDER WAS REASONABLE UNDER THE CIRCUMSTANCES HERE 39

CONCLUSION 44

TABLE OF AUTHORITIES

CASES

Page(s)

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 34

Arellano v. *Borg*, 66 F.3d 334 (9th Cir. 1995) 23

Babbitt v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) 20

Bonin v. *Calderon*, 59 F.3d 815 (9th Cir. 1995) 42

Boumediene v. *Bush*, 553 U.S. 723 (2008) 20

Bradshaw v. *Stumpf*, 545 U.S. 175 (2005) 27

Brady v. *Maryland*, 373 U.S. 83 (1963) 6

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 43

Cardinal Chemical Co. v. *Morton International, Inc.*, 508 U.S. 83 (1993) 36

Carlson v. *Landon*, 342 U.S. 524 (1952) 35, 38

Clair v. *California*, 506 U.S. 1063 (1993) 5

Clark v. *Martinez*, 543 U.S. 371 (2005) 31

Coleman v. *Thompson*, 501 U.S. 722 (1991) 38

Day v. *McDonough*, 547 U.S. 198 (2006) 23

District Attorney's Office for Third Judicial District v. *Osborne*, 129 S. Ct. 2308 (2009) 28

Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 27

Douglas Oil Co. v. *Petrol Stops Northwest*, 441 U.S. 211 (1979) 34

TABLE OF AUTHORITIES—Continued

Page(s)

Espey v. *Wainwright*, 734 F.2d 748 (11th Cir. 1984) 42

Felder v. *Goord*, 564 F. Supp. 2d 201 (S.D.N.Y. 2008) 32

Foman v. *Davis*, 371 U.S. 178 (1962) 36, 42

Gonzalez v. *Crosby*, 545 U.S. 524 (2005) 28

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 28

Hain v. *Mullin*, 436 F.3d 1168 (10th Cir. 2006) 22

Harbison v. *Bell*, 129 S. Ct. 1481 (2009) 21, 22, 40

Harrington v. *Richter*, 131 S. Ct. 770 (2011) 38

Herrera v. *Collins*, 506 U.S. 390 (1993) 41

Holland v. *Florida*, 130 S. Ct. 2549 (2010) 27

Hunter v. *Delo*, 62 F.3d 271 (8th Cir. 1995) 32, 36

Johnson v. *Gibson*, 169 F.3d 1239 (10th Cir. 1999) 36

Keeney v. *Tamayo-Reyes*, 504 U.S. 1 (1992) 28

Lindh v. *Murphy*, 521 U.S. 320 (1997) 29

Mayle v. *Felix*, 545 U.S. 644 (2005) 40

McFarland v. *Scott*, 512 U.S. 849 (1994) 18, 20, 22, 26

Mickens v. *Taylor*, 535 U.S. 162 (2002) 38

Morrissey v. *Brewer*, 408 U.S. 471 (1972) 33, 35

Murphy v. *Deloitte & Touche Group Insurance Plan*, 619 F.3d 1151 (10th Cir. 2010) 33

TABLE OF AUTHORITIES—Continued

Page(s)

Pace v. *DeGuglielmo*, 544 U.S. 408 (2005) 14

Pennsylvania v. *Finley*, 481 U.S. 551 (1987) 28, 30

People v. *Clair*, 828 P.2d 705 (Cal. 1992) 5

Perdue v. *Kenny A. ex rel Winn*, 130 S. Ct. 1662 (2010) 34

Pierce v. *Underwood*, 487 U.S. 552 (1988) 33

Piper Aircraft Co. v. *Reyno*, 454 U.S. 235 (1981) 34, 35

Post v. *Bradshaw*, 422 F.3d 419 (6th Cir. 2005) 28

Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 28

Rose v. *Lundy*, 455 U.S. 509 (1982) 28

Schell v. *Witek*, 218 F.3d 1017 (9th Cir. 2000) 38

Stafford v. *Saffle*, 34 F.3d 1557 (10th Cir. 1994) 42

Sullivan v. *Hudson*, 490 U.S. 877 (1989) 22

Taylor v. *Dickel*, 293 F.3d 427 (8th Cir. 2002) 36

United States v. *Boal*, 534 F.3d 965 (8th Cir. 2008) 24

United States v. *Brown*, 595 F.3d 498 (3d Cir. 2010) 23

United States v. *Curtin*, 489 F.3d 935 (9th Cir. 2007) 33

United States v. *Declet*, 432 F. Supp. 622 (S.D.N.Y. 1977) 23

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *I.D.P.*, 102 F.3d 507 (11th Cir. 1996) 24

United States v. *John Doe No. 1*, 272 F.3d 116 (2d Cir. 2001) 23

United States v. *Martin-Trigona*, 684 F.2d 485 (7th Cir. 1982) 36

United States v. *McClendon*, 782 F.2d 785 (9th Cir. 1986) 36

United States v. *McDaniel*, 995 F. Supp. 1095 (C.D. Cal. 1998) 32

United States v. *Prime*, 431 F.3d 1147 (9th Cir. 2005) 23, 32

United States v. *Smith*, 282 F.3d 758 (9th Cir. 2002) 37, 38

United States v. *Tarango*, 396 F.3d 666 (5th Cir. 2005) 24

United States v. *Taylor*, 487 U.S. 326 (1988) 33, 34

United States v. *Voigt*, 89 F.3d 1050 (9th Cir. 1996) 36

United States v. *White*, 451 F.2d 1225 (6th Cir. 1971) 23

Wainwright v. *Witt*, 469 U.S. 412 (1985) 38

West Virginia University Hospitals, Inc. v. *Casey*, 499 U.S. 83 (1991) 20

Wilson v. *Parker*, 515 F.3d 682 (6th Cir. 2008) 38

Wright v. *West*, 505 U.S. 277 (1992) 25

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND RULES

18 U.S.C.
§ 2518 23
§ 3006A 19, 21, 23, 25, 29, 32
§ 3006A (1982) 20
§ 3500 23
§ 3572 23
§ 3599 ..... *passim*
§ 3665 24
§ 5032 24

21 U.S.C. § 848 ..... 20, 21

28 U.S.C.
§ 2244 42
§ 2254 ..... 27, 28, 29
§ 2261 29
§ 2265 29

42 U.S.C. § 2000e-2 28

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 20

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 28

Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, 120 Stat. 230 20

Fed. R. Civ. P.
Rule 15 ..... 40, 41
Rule 60 ..... 10, 11, 12, 17, 42, 43
Rule 62.1 10

TABLE OF AUTHORITIES—Continued

Page(s)

LEGISLATIVE MATERIALS

135 Cong. Rec. S7288 (daily ed. June 22, 1989) 25

136 Cong. Rec. S9238 (daily ed. June 28, 1990) 25

137 Cong. Rec. S1069 (daily ed. Jan. 23, 1991) 25

137 Cong. Rec. S3192 (daily ed. Mar. 13, 1991) 25

139 Cong. Rec. S842 (daily ed. Jan. 27, 1993) 25

139 Cong. Rec. S2316 (daily ed. Mar. 3, 1993) 25

OTHER AUTHORITIES

1 Hertz, Randy & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (6th ed. 2011) 41

IN THE

Supreme Court of the United States

No. 10-1265

MICHAEL MARTEL, WARDEN,

Petitioner,

v.

KENNETH CLAIR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

The State characterizes the question presented as whether "a condemned state prisoner in federal habeas corpus proceedings is entitled to replace his court-appointed counsel with another court-appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence." Pet. Br. i. While the answer to that question is plainly "no," the question itself has nothing to do with the facts of this case or the court of appeals' holding.

The court below decided only that the district court had abused its discretion by denying Kenneth Clair's request for new counsel "without investigation." Pet.

App. 2. In vacating the district court's judgment, the court of appeals correctly held that 18 U.S.C. § 3599, which creates a mandatory right to appointment of counsel for indigent defendants in capital criminal trials and habeas proceedings, confers discretion on the district court to substitute new counsel "in the interests of justice." *Id.* Unlike the test the State presses for the first time in its merits brief in this Court, the "interests of justice" standard is firmly rooted in the governing statute and familiar to courts, and affords the district court broad discretion to consider both the defendant's claimed need for new counsel and any countervailing considerations advanced by the government. Indeed, in the district court, the State itself contended that substitution of counsel is a "matter ... of trial court discretion," to be exercised in "the interests of justice." JA 29.

The court of appeals' application of ordinary abuse-of-discretion principles was equally straightforward. Contrary to the State's characterization, the court did not hold as a matter of law that Clair was "entitled" to new counsel. It held only that a proper exercise of discretion required the district court to make some minimal inquiry into Clair's *pro se* allegations. That is an unremarkable application of the familiar principle that a court may not purport to exercise discretion without first informing itself of the relevant facts. Pet. App. 5.

The primary source of the State's dissatisfaction appears to be the remand the court of appeals ordered. The court's order, however, simply provided a tailored remedy to an idiosyncratic "conundrum" created by highly unusual facts. Pet. App. 6. As the State suggests (Pet. Br. 57-58), an appropriate remedy might ordinarily be a limited remand for the district court to conduct a proper inquiry into whether new counsel should be appointed. Here, however, such a remedy

would have been pointless in light of the way the particular case had already progressed. The district judge who presided over Clair's case had retired the day after denying Clair's habeas petition and his request for new counsel. Moreover, based on confirmation from Clair's counsel at the very outset of the appeal that their previous "attorney-client relationship ha[d] broken down to such an extent that substitution of counsel [would be] appropriate," Appellant's Response to Court's Sept. 15, 2005 Order at 1, Dkt. 9, *Clair* v. *Ayers*, No. 05-99005 (9th Cir. Oct. 24, 2005) ("FPD Letter"), the court of appeals itself had previously ordered that new counsel be appointed for appeal, and the district court had done so. JA 13-14. The State did not object to those orders. By the time the court of appeals decided Clair's case, the substituted lawyer had been representing Clair for almost five years. There would have been no point in remanding for a new district judge to determine whether the interests of justice would have warranted a similar substitution before the entry of the district court's judgment in 2005.

Instead, the court reasonably allowed Clair's existing counsel a chance to ask the district court to amend Clair's habeas petition *nunc pro tunc*, as if he had been substituted into the case shortly before the district court was ready to rule, rather than shortly after. Pet. App. 6. On remand, the State could oppose any such request, and the district court would have discretion to grant or deny it. *Id.* Whatever the appropriate remedy might be in a case that does not present these unique facts (or that is subject to AEDPA, which Clair's case is not), the court of appeals did not err in crafting this particular remedy here.

STATEMENT

Although the court of appeals' decision was narrow, evaluation of the rulings at issue requires familiarity with parts of the unusual history of this case.

A. Clair's Trial And Conviction

In November 1984, Linda Rodgers was found dead in the California home of Kai Henriksen and Margaret Hessling, where Rodgers had been living with her daughter and caring for Hessling's four children. Pet. App. 23-24. Hessling found Rodgers' body in the master bedroom beaten, stabbed, and strangled, her body naked from the waist down. *Id.* at 24.

Kenneth Clair was a homeless man who had been squatting in a nearby vacant house. Pet. App. 23-24. In August 1985, Clair was charged with Rodgers' murder. The prosecution sought the death penalty on the grounds that the murder occurred during a burglary and during an attempted rape. *Id.* at 25.

The main evidence against Clair in his July 1987 trial came through the testimony of Pauline Flores, Clair's girlfriend at the time of Rodgers' murder. Flores had suffered serious head injuries about two weeks before the murder, was taking pain medication at the time, offered an inconsistent version of the facts at Clair's preliminary hearing, and later recanted her story. Pet. App. 51-52; JA 36-42. She had, however, also worked with police to record a conversation she had with Clair in January 1985. In that conversation, Clair directly denied committing the murder, but also made evasive statements that the district court deemed "capable of being regarded as admissions of involvement in the murder" (an interpretation Clair disputed). Pet. App. 25; *see also id.* at 52-54.

The jury convicted Clair of murder, rejecting the allegation that it occurred during an attempted rape, but agreeing that it occurred during a burglary and imposing a sentence of death. Pet. App. 25-26. The California Supreme Court affirmed the conviction and sentence, *People* v. *Clair*, 828 P.2d 705 (Cal. 1992), and this Court denied review, *Clair* v. *California*, 506 U.S. 1063 (1993).

B. Clair's Federal Habeas Petition

Clair commenced federal habeas proceedings, and the district court appointed counsel to represent him, as required by 18 U.S.C. § 3599(a)(2). Counsel filed an initial petition in September 1994. Pet. App. 21-22.

In October 1995, after the California Supreme Court denied state post-conviction relief, Clair filed an amended federal habeas petition. *See* Dkt. 106, *Clair* v. *Woodford*, No. 2:93-cv-01133 (C.D. Cal. Oct. 16, 1995) (reprinted at ER 1498-2058).[1] Among other grounds, Clair argued that he had received ineffective assistance of counsel because his trial lawyer, who had presented essentially no affirmative defense, failed to investigate or present evidence that two of Hessling's young children, who had witnessed the murder, had told police that the killer was white (whereas Clair is black). ER 1754-1766. Clair further argued that trial counsel had unreasonably failed to investigate or introduce evidence that Kai Henriksen, who had a previous conviction for voluntary manslaughter and had pled guilty to assaulting a woman just months before Rodgers' murder, was involved with a violent motorcycle gang and was trafficking drugs out of the house where Rodgers

---

[1] Citations to "ER" refer to the Excerpts of Record filed in the court of appeals.

was murdered. ER 1517-1518, 1692, 1754-1756, 1774-1775, 1778. Clair also alleged violations of the State's obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), claiming that the prosecution had failed to make required disclosures regarding the children's statements, Henriksen's alleged drug activities, prior domestic disturbances at Henriksen's house, and other evidence that might have impeached the credibility of Flores or other witnesses. ER 1615-1649.

The pleadings were not complete until July 1998. Pet. App. 22-23. During this time, two associates of the firm that represented Clair moved to the Office of the Federal Public Defender ("FPD"), and the court approved a request to substitute the FPD as court-appointed counsel. JA 1-2. Through the FPD, Clair sought an evidentiary hearing and discovery, which the court granted in part. Pet. App. 22-23.[2] The hearing was held in August 2004, and the parties completed post-hearing briefing on January 31, 2005. *Id.*

C. Clair's Requests For New Counsel

By 2004, Clair's relationship with the FPD had begun to deteriorate. Before the evidentiary hearing in August, Clair independently enlisted private investigator C.J. Ford to look into his case. JA 56-57.[3] Clair instructed his counsel to cooperate, but the FPD provided

---

[2] The court ordered a hearing on an issue of juror misconduct and on Clair's claims that trial counsel had unreasonably failed to introduce certain evidence in the guilt phase or to investigate or present important mitigation evidence in the penalty phase. ER 76-77.

[3] Although someone originally agreed to pay Ford on Clair's behalf, Ford ultimately worked for Clair *pro bono*. JA 56-57.

no assistance and indeed resisted Ford's efforts. JA 57, 65-66; ER 217. Ford nonetheless was able to locate a potential alibi witness the FPD had never interviewed, and he obtained a declaration from Flores recanting key portions of her trial testimony. JA 36-42, 57-58.

On March 16, 2005, Clair wrote to the district court expressing concern that the FPD "no longer ... ha[d] [his] best interest at hand" and saying that he no longer wanted them to handle his case. JA 24; *see* JA 19-25. As examples, Clair complained that his lead counsel had admitted she had never read his principal post-hearing brief; that the FPD had failed even to try to locate the potential alibi witness that Ford later found; that they had turned away offers of assistance; and that they were focusing on penalty issues rather than sufficiently contesting the reliability of the guilt-phase verdict. JA 20-25. He alleged that the FPD had repeatedly dismissed his efforts to participate in planning litigation strategy, and that when he raised questions about the conduct of his case, his lead counsel challenged him to fire her. JA 22. As a result of these and other incidents, Clair felt that he and his counsel were not "on the same team." JA 23.

The court directed counsel on both sides to address Clair's letter. JA 18. The State responded that "[w]hat the trial court does with respect to appointing counsel is within its discretion, providing the interests of justice are served." JA 29. It argued, however, that "nothing in [Clair]'s letter require[d] a change of appointed counsel," because the FPD lawyers were "doing their job as required," substitution would cause unwarranted delay, and there was no danger to Clair's due process rights. JA 29-31. The FPD informed the court that "[a]fter meeting with Mr. Clair, counsel understands that Mr. Clair wants the [FPD] to continue

to serve as his counsel in this case at this time." JA 27. Based on that representation, the court decided on April 29, 2005 that it would "take no further action on the matter at this time." JA 33.

Meanwhile, Ford continued his investigation. His most significant discoveries concerned the physical evidence that had been collected from the scene of Rodgers' murder.[4] In the early 1990s, one of Clair's original habeas attorneys had asked to review the evidence, but the police department apparently claimed it had been lost or destroyed. ER 220-221, 234. In the ensuing years of litigation, Clair's counsel never probed or challenged that claim. ER 234. When Ford took the matter up, he learned after persistent inquiry that the police did have the evidence after all. After reviewing that evidence in late May 2005, Ford informed Clair that substantial biological material and fingerprints appeared to be available, but that further analysis would be required to determine whether the evidence was in suitable condition for testing or comparison purposes. JA 58-59, 67; ER 218, 237-238.

Three weeks later, on June 16, 2005, Clair wrote to the court to renew his request for new counsel. JA 62-70.

---

[4] At trial, the parties had stipulated that none of the physical evidence implicated Clair. ER 3131-3134. According to the stipulation, fingerprints found at the scene did not match Clair, Rodgers, Henriksen, or Hessling, but were either unsuitable for further comparison or came from objects that had gone through the U.S. mail; testing of cigarette butts found at the scene showed they might have been smoked by Rodgers, but had not been smoked by Clair; and hairs recovered on or near the body were inconsistent with Clair. *Id.* There was also testimony at trial that vaginal swabs of the victim yielded no sperm, and that Clair's blood was not found at the scene.

In addition to reiterating many of his previous complaints, Clair explained that since he sent his previous letter "there ha[d] been many more things revealed to [him] that ha[d] created a conflict of interest[]" with the FPD, that there had been a "total break down of communication" with the FPD, and that he was "no longer able to trust anybody within that office." JA 62-63. In particular, Clair informed the court that, despite Ford's discovery, the FPD was making no effort to analyze the previously missing physical evidence or to present it to the court. JA 67-69.

Ford submitted his own letter to substantiate Clair's assertions. JA 56-60. That letter described Ford's investigation, including his success in locating the physical evidence and the lack of assistance from the FPD. JA 58. Ford stated that he had found blood, hair, and other physical evidence that needed to be analyzed to determine if it could be subjected to DNA testing, and fingerprints that "did not belong to Kenneth Clair, the victim, or the owners of the house" and thus could have belonged to the "real perpetrator." *Id.* Ford said that although he had been trying without success to convince the district attorney's office to analyze the evidence, Clair's attorneys were neither assisting nor investigating themselves. JA 58-60.

The district court did not ask counsel to respond to Clair's or Ford's letters, nor did it make any other inquiry into their allegations. Indeed, on June 24, 2005, the court rejected Ford's letter without filing it, citing a local rule prohibiting communication with the court by letter. JA 4-5, 53-55. On June 30, 2005, the court denied Clair's request for new counsel, stating only:

> It does not appear to the Court that a change of counsel is appropriate. It appears that

> Petitioner's counsel is doing a proper job. No conflict of interest or inadequacy of counsel is shown.

JA 61. The same day, the court denied Clair's habeas petition on the merits. JA 5; Pet. App. 20-91.[5] The next day, the district judge retired. Pet. App. 4.

D. Clair's Appeal And Further Proceedings

The FPD filed a notice of appeal on Clair's behalf, and Clair himself filed a notice seeking review of the denial of his request for new counsel. JA 6. The court of appeals treated the matter as one appeal and ordered the FPD to respond to Clair's *pro se* appeal. JA 6, 12.

On October 21, 2005, the FPD informed the court that it had consulted with Clair and that "the attorney-client relationship ha[d] broken down to such an extent that substitution of counsel [would be] appropriate." FPD Letter at 1. The court construed the FPD's letter as a motion for appointment of new counsel and granted the motion, without objection or comment by the State. JA 13. In January 2006, the district court appointed John Grele as substitute counsel, again without objection or comment by the State. JA 14; Pet. App. 6.

Through Grele, Clair sought relief from judgment in the district court in June 2006 under Federal Rule of Civil Procedure 60(b). JA 7.[6] He asked that the

---

[5] The court issued a certificate of appealability on Clair's penalty-phase ineffective assistance claims. Pet. App. 91.

[6] Because Clair had already filed a notice of appeal, he filed an application in the district court for leave to file the Rule 60(b) motion, in accordance with circuit practice at the time. *Cf.* Fed. R. Civ. P. 62.1 (adopted in 2009).

judgment denying his habeas petition be vacated so he could have time and funding to do what the FPD had refused to do: have the fingerprints and biological material analyzed and tested. ER 222-239. He argued that such testing could link someone else to the crime or support additional ineffective assistance or *Brady* claims. ER 225-226, 228, 234-235.[7]

Because the district judge presiding over Clair's habeas case had retired, the case was reassigned. *See* Notice of Reassignment, Dkt. 423, *Clair* v. *Woodford*, No. 2:93-cv-01133 (C.D. Cal. July 6, 2006). Less than three months later, in September 2006, the court declined to entertain Clair's Rule 60(b) motion. JA 8; Pet. App. 14. Because Clair could not yet demonstrate the significance of the newly available evidence, the court concluded that he had "fail[ed] to specify the claims [the evidence] would buttress or introduce" and thus could not satisfy the standard for relief under Rule 60(b). Pet. App. 15-18. As to Clair's contention (ER 230-231) that the FPD's failure to pursue the evidence constituted extraordinary circumstances warranting relief under Rule 60(b), the court noted the previous judge's statement that "no justification for a change of counsel had been provided," and held that Clair was not prejudiced by the denial of new counsel because "no ... new

---

[7] To support the Rule 60(b) motion, Clair submitted declarations of Grele and Ford. The Ford declaration and portions of the Grele declaration were redacted and filed under seal to exclude privileged discussions. The State complains (Pet. Br. 8, 11 n.9, 61 n.28) that these "secret filings" contained "information never disclosed to the State." A review of the sealed declarations—which are in the record available to the Court (ER 3508-3523)—confirms that they contain no information unknown to the State except the work product and mental impressions of Clair's counsel and investigator.

evidence exist[ed]" that would have warranted further proceedings. Pet. App. 18-19. Clair appealed, and on April 9, 2007, the court of appeals ordered the district court to enter a decision on the merits of the Rule 60(b) motion. JA 9; *supra* n.6. On May 21, 2007, the district court denied the motion and granted a certificate of appealability. Pet. App. 9-11.

On June 4, 2007, Clair moved for reconsideration of the denial of his Rule 60(b) motion, advising the district court that he was pursuing discovery in state court and that, through those proceedings, the State had finally agreed to disclose additional documents relating to Clair's case and the physical evidence. ER 172-173, 176.[8] Clair asked for time and resources to examine the supposedly forthcoming evidence and determine what claims for relief it might support. ER 170-177. On June 19, 2007, before any such examination could be done, the district court denied Clair's motion for reconsideration. ER 1-3. Clair appealed. JA 10-11.

Clair's counsel later learned by chance that the State had begun DNA testing of physical evidence collected from the scene of Rodgers murder, without notice

---

[8] Clair also informed the court that the State had recently revealed that it had conducted DNA analysis on evidence collected from a separate homicide that occurred a few miles away on the night before Rodgers' murder. ER 176. The circumstances of that homicide and the condition of the female victim's body were similar to those in this case, including a similar puncture wound on the victim's neck. Because of the similarities, police had suspected Clair in the other homicide, even though he had been in jail when that homicide occurred. Police files disclosed through state-court discovery in 2007 and 2008 revealed that police had compared Clair's DNA to samples taken from the scene of the other homicide, and that Clair had been excluded as a suspect. Opp. App. 15-17, 58-63.

to Clair. Opp. App. 12-15, 59-64.[9] The State verbally reported to Clair's counsel that a glove found near Rodgers' body had been tested and yielded a male profile that did not match Clair. *Id.* at 12-14, 61. It further reported that vaginal swabs from Rodgers' body had been tested and yielded two male profiles that did not match Clair. *Id.*; *see also id.* at 72-73.[10] After further motions practice in state court, the State disclosed the underlying data, lab notes, and reports. From that evidence, Clair's counsel also learned more about the additional fingerprints found at the murder scene that did not match Clair, Rodgers, or any other resident of the house. In particular, he learned that those prints, which had not been compared against the available databases, were usable and—contrary to the stipulation entered at trial—came from objects that had *not* traveled through the U.S. mail. *Id.* at 17-18, 60-61; *see supra* n.4.

Based on these new disclosures and test results, Clair filed a new state-court petition, alleging actual innocence as well as improper suppression of evidence and other errors.[11] He submitted an identical petition to the federal court of appeals, asking that it be filed as a

---

[9] When the State conducted this *ex parte* testing, Clair's counsel was attempting to document the condition of the evidence to determine whether it had been contaminated or subject to tampering. Opp. App. 13. Because DNA testing consumes biological materials in a manner that may preclude further analysis, Clair objected to any further testing without an agreement. *Id.*

[10] In January 2008, Clair's counsel obtained an unsigned copy of the written report indicating that the DNA testing had been performed in October 2007. Opp. App. 13-14, 62; *see id.* at 66-73.

[11] Without holding a hearing, the California Supreme Court summarily denied Clair's state habeas petition on August 24, 2011. *In re Clair*, No. S169188.

protective placeholder petition under *Pace* v. *DeGuglielmo*, 544 U.S. 408, 416 (2005). *See* Opp. App. 1-29 (docketed as *Clair* v. *Ayers*, No. 08-75135 (9th Cir.)). The application sought a remand to the district court for purposes of introducing the new evidence into the district court record. Clair also asked the court of appeals to consider the protective petition in its disposition of his pending appeal from the judgment denying habeas relief.

E. The Court Of Appeals' Decision

The court of appeals consolidated Clair's appeals. On November 17, 2010, the court issued the order under review here, vacating and remanding the district court's orders denying Clair's habeas petition and his request for new counsel. On the same day, the court denied Clair's motions relating to the protective petition as moot and transferred that petition to the district court.

The sole issue addressed in the court of appeals' unpublished opinion was whether the district court had "abused its discretion by denying without investigation [Clair's] June 2005 request that the court replace his appointed counsel with new counsel." Pet. App. 2. Interpreting 18 U.S.C. § 3599, the court determined that "when faced with Clair's request for new counsel, the district court was required at a minimum to ascertain whether the interests of justice required that the request be granted." *Id.* at 3. The court held that the district court had abused its discretion by denying Clair's request for substitution of counsel without first making any "inquiry into the truth of Clair's allegations or their potential impact on the case before it." *Id.* at 4; *see also id.* at 4-5. "[B]y failing to exercise its discretion at all," the court held, "it abused it." *Id.* at 5.

The court accordingly vacated the district court's denial of Clair's request for new counsel. Pet. App. 5. In light of the procedural history, however, the question of "how to correct on remand the district court's abuse of discretion" presented a "conundrum," because Clair already had new counsel and the district judge had retired. *Id.* at 6. To address that unusual situation, the court found that the "most reasonable solution" was to "treat Clair's current counsel as if he were the counsel who might have been appointed had the district court properly exercised its discretion in response to Clair's request for new counsel." *Id.* On remand, counsel would consult with Clair to determine "what actions and submissions to the district court, if any, would be appropriate before the district court rules anew on Clair's habeas petition, and then proceed accordingly." *Id.* The district court in turn would "consider any such submissions, including any requests from counsel to amend the petition to add claims based on or related to the alleged new physical evidence, as if they had been made prior to the ruling on the writ that we have vacated and shall make all further determinations that may be required in accordance with applicable law." *Id.*

SUMMARY OF ARGUMENT

The decision under review addressed only one issue: whether "the district court abused its discretion by denying without investigation [Clair's] June 2005 request that the court replace his appointed counsel with new counsel." Pet. App. 2. The court of appeals did not hold that, on these facts, Clair was actually entitled to new counsel. Nor did it hold that Clair was necessarily entitled to assert new claims for habeas relief. It held only that the district court abused its discretion by denying Clair's request for new counsel "without making some inquiry into Clair's allegations." *Id.* at 4.

The State does not deny that Clair's request for substitution of counsel called for the district court to make a discretionary determination that is subject to review for abuse of discretion. Instead, the State focuses on the substantive standard to be applied in evaluating such a request. It contends that a trial court's discretion should be restricted by a novel three-part test, under which existing counsel may be replaced only upon a showing that he fails to meet the statutory qualifications, suffers from an actual conflict of interest, or has completely abandoned his client. But there is no basis in the appointment-of-counsel statute for limiting the court's discretion in this way.

The court of appeals correctly interpreted 18 U.S.C. § 3599 to permit substitution of counsel in capital habeas cases when, in view of all relevant circumstances, substitution serves "the interests of justice." That standard, drawn from a parallel statute that applies in non-capital cases, is familiar, workable, and consistent with the history and purposes of the statutory framework. Applying it here, the court reasonably found that "when faced with Clair's request for new counsel, the district court was required at a minimum to ascertain whether the interests of justice required that the request be granted." Pet. App. 3. The district judge's decision instead on the eve of his retirement to deny Clair's request without making any such inquiry, even if only by ordering counsel to respond, was an abuse of discretion.

In criticizing the court of appeals' analysis, the State appears to conflate what the court did at the outset of Clair's appeal with the remedy it later ordered after finding an abuse of discretion. Shortly after Clair appealed in 2005, the court of appeals asked counsel to address Clair's renewed request for substitution. The

FPD confirmed the breakdown in its relationship with Clair, and the court ordered the appointment of new counsel on appeal. The State did not object to the appointment of new counsel at that time. Now, however, it attacks the court of appeals' *later* decision (in 2010) as if the court had held that Clair was "entitled" to new counsel when he sought it in the district court, and had ordered substitution on that basis. *E.g.*, Pet. Br. 15 (court of appeals "was wrong to require substitution"); *id.* at 17 (court erroneously "allow[ed] substitution"); *id.* at 46 (criticizing panels' "peremptory decision to grant Clair new counsel"). That is not what happened. Rather, the court found an abuse of discretion in the district court's treatment of Clair's request and crafted a reasonable remedy that was tailored to the unusual procedural history of this case. It did not purport to decide what the "interests of justice" would have required in this case in June 2005 or what remedy should apply in any other case.

The State attacks that remedy as inconsistent with AEDPA and with the district court's disposition of Clair's Rule 60(b) motion. But Clair's case is not subject to AEDPA, and nothing in the court of appeals' order allows him or any other defendant an "end-run" around it. The court of appeals held only that there was no point in revisiting the "new counsel" issue on remand where in fact new counsel had long since been appointed for other reasons. It then afforded Clair an opportunity for that counsel to *ask* the district court to permit amendment of Clair's habeas petition before the entry of judgment, under the same legal standards and constraints that would have applied if the district court had decided to make the substitution when Clair sought it in that court. Nothing in the district court's resolution of Clair's Rule 60(b) motion renders that resolution

unreasonable, because the district court rejected that motion on an undeveloped record and under the even more stringent standard that governs the reopening of final judgments. The court of appeals' order thus appropriately balances the various interests at issue in this case, protecting both the statutory right to counsel conferred on Clair by Congress and the State's ability to raise on remand its arguments that there is no basis for further proceedings in the district court.

ARGUMENT

I. THE "INTERESTS OF JUSTICE" STANDARD GOVERNS MOTIONS FOR SUBSTITUTION OF APPOINTED COUNSEL IN CAPITAL PROCEEDINGS

Section 3599 of Title 18 provides a statutory right to appointment of counsel for indigent defendants in capital cases. 18 U.S.C. § 3599(a). This right applies in habeas corpus proceedings as well as in capital trials, reflecting Congress's "determination that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and ... the unique and complex nature of the litigation.'" *McFarland* v. *Scott*, 512 U.S. 849, 855 (1994) (alteration in original); *compare* 18 U.S.C. § 3599(a)(1) *with id.* § 3599(a)(2).

Section 3599 on its face permits substitution of appointed counsel "upon motion of the defendant." 18 U.S.C. § 3599(e). The court of appeals sensibly held that such a motion, like countless other matters pertaining to the conduct of litigation, is committed to the district court's sound discretion, to be exercised in "the interests of justice." Pet. App. 2-3. That standard is faithful to the structure, history, and purpose of the statutory framework; it is familiar to courts; and it is easily administrable. The State now proposes a novel

and more complicated three-part test, apparently intended to limit the discretion of trial courts and to reduce the chance that a defendant might obtain new counsel. While the three factors the State emphasizes may well be relevant to a court's application of the "interests of justice" standard, however, there is no basis for concluding that they are the *only* factors a court may consider in exercising its discretion.

A. The "Interests Of Justice" Standard Is Consistent With The Structure, History, And Purpose Of Section 3599

The text of Section 3599(e) is silent as to the standard under which a motion for substitution of counsel should be evaluated. Other features of the statutory framework, however, confirm that the "interests of justice" is the appropriate substantive standard. In particular, a parallel provision in Section 3006A provides for the discretionary appointment of counsel for indigent defendants in misdemeanor criminal trials and for habeas petitioners in non-capital cases. 18 U.S.C. § 3006A(a)(2). That provision permits substitution of counsel "in the interests of justice" at "any stage of the proceedings." *Id.* § 3006A(c). The court of appeals correctly held that the same standard should apply to motions under Section 3599(e). As the court explained, Congress's establishment of a statutory right to the appointment of specially qualified counsel in Section 3599 shows "the importance that [Congress] placed on 'quality legal representation' for capital habeas defendants." Pet. App. 3. It seems self-evident that Congress must also have intended to provide such defendants with "at least as much opportunity to replace counsel" as it provides non-capital defendants who have no such statutory right. *Id.*

This interpretation follows the approach this Court adopted in *McFarland*. There, the Court considered "how a capital defendant's right to counsel ... shall be invoked" under the predecessor to Section 3599. 512 U.S. at 854-855. As in this case, the statute's "express language" did not specify an answer. *Id.* at 854. The Court accordingly construed the statute "in light of its related provisions." *Id.* at 854-855.[12]

Taking that approach here makes particular sense in light of the history of Section 3599. Before enactment of the predecessor to Section 3599 in 1988, appointment of counsel for indigents in *all* habeas cases, capital or otherwise, was subject to trial court discretion under Section 3006A. At that time, Section 3006A provided, as it does today, that motions for substitution of counsel would be determined "in the interests of justice." 18 U.S.C. § 3006A(c) (1982). Any request for substitution of appointed counsel in a capital case would thus have been evaluated under that standard.

Congress made appointment of counsel mandatory in capital cases when it enacted the predecessor to Section 3599, codified at 21 U.S.C. § 848(q), in the Anti-Drug Abuse Act of 1988. *See* Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4393-4394.[13] Like Section 3599, Section

---

[12] "When interpreting a statute, we examine related provisions in other parts of the U.S. Code." *Boumediene* v. *Bush*, 553 U.S. 723, 776 (2008) (citing *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 88-97 (1991), and *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 717-718 (1995) (Scalia, J., dissenting)).

[13] Section 848(q) was recodified at 18 U.S.C. § 3599, without other change, by the Terrorist Death Penalty Enhancement Act of 2005, Pub. L. No. 109-177, § 222, 120 Stat. 230, 231.

848(q) provided that appointed counsel could be replaced upon motion of the defendant, but did not state what standard would apply to such a motion. Nothing in the new provision, however, purported to depart from the "interests of justice" standard that had long applied to motions for new counsel. Nor is there anything to suggest any legislative intent to make it more difficult to obtain substitution of counsel in capital cases than it had been under Section 3006A.[14] To the contrary, Congress created special mandatory rules for capital cases in order to be *more solicitous* of capital defendants' greater need for the assistance of well-qualified counsel. It strains credulity to argue, as the State apparently does, that in the same Act Congress silently made it more difficult for a capital defendant to seek substitution of counsel if the need arose. The only reasonable conclusion is instead the one adopted by the court of appeals: Congress surely intended capital habeas petitioners to have at least as much opportunity to substitute counsel as they used to have (and as non-capital habeas petitioners continue to have) under Section 3006A.

That analysis also serves the purposes of Section 3599 as reflected in other provisions of the statute. Section 3599 imposes more stringent qualification requirements for appointed counsel in capital cases, 18 U.S.C. § 3599(b)-(d); permits higher rates of compensation, *id.* § 3599(g); and entitles petitioners to reasonably necessary investigative, expert, and other services, *id.* § 3599(f). As this Court recognized in *McFarland*, Congress enacted these provisions—which far exceed

---

[14] The legislative history of Section 848(q) sheds no direct light on Congress's failure to include a standard to govern substitution-of-counsel motions in capital proceedings. *See Harbison* v. *Bell*, 129 S. Ct. 1481, 1489 (2009).

the constitutionally required minimum—to "promot[e] fundamental fairness in the imposition of the death penalty." 512 U.S. at 859; *see id.* at 855-856. The Court reiterated that interpretation in *Harbison* v. *Bell*, 129 S. Ct. 1481 (2009), construing Section 3599 broadly in light of the "basic purpose of the statute," "the breadth of the representation contemplated," and the importance of counseled post-conviction proceedings to death-sentenced prisoners. *Id.* at 1487 & n.6, 1490. Construing Section 3599(e) to permit substitution of appointed counsel in the interests of justice is the only sensible approach in light of the concern with "fundamental fairness" that Congress manifested in every aspect of the mandatory capital counsel-appointment statute. *McFarland*, 512 U.S. at 859; *see also, e.g.*, *Sullivan* v. *Hudson*, 490 U.S. 877, 890 (1989) (adopting "the most reasonable interpretation of [a] statute in light of its manifest purpose").[15]

Finally, the "interests of justice" standard has the added advantages of familiarity and administrability. District courts and courts of appeals regularly apply the "interests of justice" standard in adjudicating motions for appointment or substitution of counsel under

---

[15] The State seeks to rely on *Harbison* by arguing creatively that, because Congress intended to emphasize continuity of appointed counsel where possible, it must also have meant to foreclose *substitution* of counsel except in the narrowest circumstances. Pet. Br. 14-15, 31, 32. *Harbison*, however, emphasized the need for continuity of counsel because "Congress did not want condemned men and women to be *abandoned* by their counsel at the last moment ... ." 129 S. Ct. at 1491 (quoting *Hain* v. *Mullin*, 436 F.3d 1168 (10th Cir. 2006) (en banc)) (emphasis added). That concern with ensuring the continuous assistance of appropriate counsel strongly supports allowing substitution if and when it becomes necessary "in the interests of justice."

Section 3006A, and have developed clear standards for evaluating such requests.[16] To take other examples from the criminal context, courts regularly consider the "interests of justice" in determining whether to release intercepted communications or evidence to an aggrieved party, 18 U.S.C. § 2518; in deciding whether to declare a mistrial where the United States fails to produce Jencks Act materials, *id.* § 3500; in setting the schedule for payment of a fine as part of a criminal sentence, *id.* § 3572; and in determining whether to address the merits of a habeas petition before dismissing it as time-barred, *Day* v. *McDonough*, 547 U.S. 198, 210 (2006). Courts of appeals, in turn, are equally familiar with reviewing applications of the standard for abuses of discretion in a wide variety of contexts.[17] Given the

---

[16] The court below has considered "three elements when reviewing a district court's denial of a substitution motion [under Section 3006A]: 1) the timeliness of the motion; 2) the adequacy of the district court's inquiry into the defendant's complaint; and 3) whether the asserted conflict was so great as to result in a complete breakdown in communication and a consequent inability to present a defense." *United States* v. *Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005). Other courts look to similar considerations. *See United States* v. *John Doe No. 1*, 272 F.3d 116, 122-123 (2d Cir. 2001) (noting consensus among circuit courts as to factors relevant to evaluating district court's exercise of discretion in denying a motion to substitute counsel in criminal cases); *see also, e.g.*, *Arellano* v. *Borg*, 1995 WL 525252, at *2 (9th Cir. Sept. 6, 1995) (unpublished) (listing factors); *United States* v. *White*, 451 F.2d 1225, 1226 (6th Cir. 1971) (reviewing denial of motion for substitution of counsel for abuse of discretion under 18 U.S.C. § 3006A); *United States* v. *Declet*, 432 F. Supp. 622, 623-624 (S.D.N.Y. 1977) (finding "interests of justice" would be "best served by the substitution of counsel" under 18 U.S.C. § 3006A).

[17] *See, e.g.*, *United States* v. *Brown*, 595 F.3d 498, 522 (3d Cir. 2010) (reviewing district court's decision to reject plea agreement

ubiquity of the "interests of justice" standard, there is no basis for concluding that Congress silently prescribed some new and different standard for Section 3599.

B. The State's Proposed Standard Has No Basis In The Text, History, Or Purpose Of Section 3599

In the district court, the State recited as an established and uncontroversial proposition that substitution of counsel is a "matter ... of trial court discretion," based on "the interests of justice." JA 29. The State now repudiates that standard and argues for a novel three-part test it never advanced in the courts below or even in its petition for certiorari. That test would permit substitution only where counsel fails to meet the statutory qualifications, labors under an actual conflict of interest, or "abandons" his client by completely failing even to review the record. Pet. Br. 35-38. Each of these factors may well be relevant in determining whether a capital defendant's court-appointed counsel should be replaced in a given case. But the State's new position that these are the only factors a court may consider has no basis in the statute and makes no practical sense.

"in the interests of justice" for abuse of discretion); *United States* v. *Boal*, 534 F.3d 965, 968 (8th Cir. 2008) (same as to district court's decision to adjust restitution payment schedule "as the interests of justice require" under 18 U.S.C. § 3665(k)); *United States* v. *Tarango*, 396 F.3d 666, 675 (5th Cir. 2005) (same as to district court's decision "that the interests of justice warranted granting [defendant] a new trial"); *United States* v. *I.D.P.*, 102 F.3d 507, 514 (11th Cir. 1996) (same as to district court's determination whether transfer of juvenile to adult status would be "in the interests of justice" under 18 U.S.C. § 5032).

1. The State cites no language in Section 3599 or Section 3006A to support its exclusive three-factor test, and there is none. To the contrary, the text refutes the State's claim. Section 3599(e) provides that appointed counsel may be replaced by "*similarly qualified* counsel" (emphasis added). It thus assumes that appointment of new counsel may be permitted even where a defendant already has appointed counsel who is "similarly qualified" under subsections (b), (c), and (d). Likewise, nothing in the statutory history of Section 3599 supports the State's new position. To the contrary, as discussed above, the statute's roots in Section 3006A support the continued use of that provision's "interests of justice" standard. *Supra* pp. 20-21.[18]

Nor has any court adopted or even suggested anything like the exclusive three-part test advanced by the State, and for good reason. The State's position would require litigation focused on such questions as precisely when a court-appointed attorney has "completely abandoned" his client or fallen short of the statutory qualifications. These determinations are not necessarily straightforward, and they may not address the real causes for concern in a given case.[19] Given Congress's

---

[18] Congress has repeatedly rejected attempts to weaken the protections of Section 3599. *See, e.g.*, 139 Cong. Rec. S2316, S2321 (daily ed. Mar. 3, 1993); *id.* at S842, S846 (daily ed. Jan. 27, 1993); 137 Cong. Rec. S3192, S3220 (daily ed. Mar. 13, 1991); *id.* at S1069, S1073 (daily ed. Jan. 23, 1991); 136 Cong. Rec. S9238, S9240 (daily ed. June 28, 1990); 135 Cong. Rec. S7288, S7293 (daily ed. June 22, 1989); *cf. Wright* v. *West*, 505 U.S. 277, 305-306 (1992) (O'Connor, J., concurring) (discussing failed attempts to amend federal habeas statute).

[19] For example, while the State argues that a lawyer's "abandonment" of his client would not justify replacement except in the

focus in Section 3599 on "promoting fundamental fairness in the imposition of the death penalty," *McFarland*, 512 U.S. at 859, it makes no sense to constrict the district court's discretion or misdirect the courts' and the parties' efforts in undertaking what will always be a highly case-specific inquiry. That is especially true because a habeas petitioner seeking replacement of his attorney will quite likely be appealing to the trial court, as Clair did here, without yet having the assistance of other counsel.

Indeed, the State's view of the district court's discretion is so narrow that it would render Section 3599(e)'s express provision for substitution of counsel virtually meaningless. Under the State's test, a district court presiding over a capital case would be precluded from substituting counsel except in cases where, in effect, the defendant or habeas petitioner had been completely "denied his statutory right to counsel." Pet. Br. 17; *see also id.* at 33, 35, 41. Such a deprivation, however, would automatically trigger a right to appointment of new counsel under Section 3599(a)(2) because the defendant or habeas petitioner would effectively have none, contrary to the statutory mandate. In that case, the language of Section 3599(e) permitting

---

"extreme circumstance" in which counsel did not even review the record in the case (Pet. Br. 38), it is far from clear why other forms or degrees of "abandonment" could not also suffice. *Cf. Maples* v. *Thomas*, No. 10-63 (argued Oct. 4, 2011). Similarly, determining whether appointed counsel meets the statutory qualifications of Section 3599 is hardly a bright-line exercise, where the statute permits appointment of an attorney whose "background, knowledge, or experience would ... enable him or her to properly represent the defendant" even if objective qualifications are not met. 18 U.S.C. § 3599(d).

the court to "replace[]" an existing attorney with "similarly qualified counsel" would be superfluous, contrary to basic rules of statutory construction. *See, e.g., Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476-477 (2003).

2. Lacking support in Section 3599 or its history or purpose, the State relies mainly on general principles of comity, federalism, and finality underlying the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Pet. Br. 19-21, 26-31. AEDPA has little bearing here, however, because it does not govern habeas petitions filed, as Clair's was, before its effective date. JA 1; *see, e.g., Bradshaw* v. *Stumpf*, 545 U.S. 175, 182 (2005). In addition, the predecessor to Section 3599 was enacted before AEDPA and then reenacted without change after AEDPA had been adopted. Thus, nothing in or about AEDPA sheds much light on how Congress intended courts to apply Section 3599.

Moreover, this Court made clear in *Holland* v. *Florida*, 130 S. Ct. 2549 (2010), that AEDPA's general purposes do not contravene "basic habeas corpus principles," including longstanding equitable and discretionary protections. *Id.* at 2562. Rather, "[t]he importance of the Great Writ, ... along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." *Id.*

Nor does any specific provision of AEDPA support the State's position. Section 2254(i), cited by the State (Pet. Br. 26), provides only that ineffectiveness or incompetence of counsel during post-conviction proceedings "shall not be a ground for *relief*." 28 U.S.C. § 2254(i) (emphasis added). Clair has not sought and did not

receive habeas *relief* on account of the performance of his appointed habeas counsel. He sought appointment of substitute counsel, before judgment on his habeas petition, to pursue previously undisclosed evidence that his existing counsel had allegedly refused to investigate.[20]

The State attempts to read Section 2254(i) more broadly, on the theory that Congress must have "had something more in mind" when it enacted Section 2254(i) than simply barring "relief" based on ineffectiveness or incompetence of counsel, because "an ineffectiveness claim was already not cognizable as a basis for habeas relief under this Court's controlling precedent." Pet. Br. 28. But Congress regularly codifies decisions of this Court, and did so throughout AEDPA.[21] There is no basis for the assertion that in framing Section 2254(i) Congress intended to do anything more than codify the holding of *Pennsylvania* v. *Finley*,

---

[20] For this reason, the State's reliance on *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005), *Post* v. *Bradshaw*, 422 F.3d 419 (6th Cir. 2005), and similar cases is misplaced. *See* Pet. Br. 28-29. Unlike those decisions, this case involves the adjudication of a pre-judgment motion for new counsel, not a post-judgment motion attacking the district court's decision on the merits. Clair thus is not "ask[ing] for a second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n.5.

[21] *See, e.g.*, *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 129 S. Ct. 2308, 2324-2325 (2009) (Alito, J., concurring) (discussing AEDPA codification of the exhaustion requirement of *Rose* v. *Lundy*, 455 U.S. 509 (1982), and the cause-and-prejudice rule of *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1 (1992)); *see also, e.g.*, 42 U.S.C. § 2000e-2(m) (codifying the "mixed-motive" framework of *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 258 (1989)); Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071 (codifying "business necessity" and "job related" concepts of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)).

481 U.S. 551 (1987). Indeed, the State elsewhere concedes as much. Pet. Br. 26 ("[Section] 2254(i) ... codified this Court's holdings that ineffectiveness of habeas counsel is not a ground for habeas relief."). Moreover, the State's reading of Section 2254(i) proves too much. Section 2254(i) applies to any "proceeding under section 2254," including non-capital habeas cases in which substitution of counsel is subject to Section 3006A. *See* 28 U.S.C. § 2254(i), (h). In non-capital cases, Section 3006A by its terms permits substitution of counsel "in the interests of justice." 18 U.S.C. § 3006A(c). Under the State's reading, however, Section 2254(i) would foreclose substitution of counsel even where Section 3006A would expressly allow it.

The State's reliance on 28 U.S.C. § 2261(e) is also misplaced. That provision is part of Chapter 154's "opt in" scheme, which provides special rules for federal-court review of state-court judgments in capital habeas cases if a State meets certain conditions, including the appointment of "competent counsel in State post-conviction proceedings." 28 U.S.C. § 2265(a)(1)(A); *see also id.* § 2261(b); *Lindh* v. *Murphy*, 521 U.S. 320, 327 (1997). Section 2261(e) provides that the absence of such "competent counsel" may not be a basis for habeas relief. Its second sentence, on which the State relies, merely negates any possible implication that Congress intended to preclude trial courts from removing and replacing incompetent counsel. It does not purport to govern appointment or substitution of counsel outside Chapter 154, or even to limit the occasions for substitution of counsel within that context. If anything, the second sentence of Section 2261(e) reinforces that a petitioner in a case "arising under section 2254," but subject to the Chapter 154 special rules, retains the protections that otherwise apply outside Chapter 154—

including the opportunity to seek substitution of counsel in the interests of justice under Section 3599.

3. The State challenges the "interests of justice" standard on the ground that it "endow[s] a capital habeas corpus litigant with greater latitude to substitute counsel than that possessed under the Constitution by defendants in criminal trial." Pet. Br. 16. This case, however, involves a *statutory* right to counsel in federal capital proceedings, conferred by Section 3599(a) and protected by Section 3599(e), that far exceeds what the Constitution requires. Most obviously, the statutory right to counsel extends to habeas proceedings, while the Sixth Amendment right does not. *See Finley*, 481 U.S. at 557. Congress has also established statutory qualifications for appointed counsel that exceed the standard of constitutionally adequate assistance under the Sixth Amendment. *See* 28 U.S.C. § 3599(b)-(d). And it expanded the scope of the right to appointed counsel and related services beyond what the Sixth Amendment requires in criminal trials. *Id.* § 3599(e)-(g). It is therefore unsurprising that the same statute gives capital defendants and habeas petitioners a right to seek substitution of counsel that likewise exceeds what the Constitution would require.[22]

---

[22] The State accordingly errs in contending (*e.g.*, Pet. Br. 16) that the "interests of justice" could not warrant substitution of counsel where Clair's letter did not evince any harm to his Due Process or Sixth Amendment rights, for the underlying statutory right at issue goes well beyond the protection those constitutional provisions confer. Moreover, the State's argument is unworkable. A court faced with a pre-judgment request for new counsel cannot predict whether a failure to replace counsel would result in a judgment that violates the Due Process Clause or the Sixth Amendment right to counsel.

Moreover, as to these statutory rights, Congress has treated all federal capital proceedings in precisely the same way. Section 3599 on its face equates the statutory right to counsel of a capital petitioner in federal collateral proceedings with that of a capital defendant in a criminal trial. *Compare* 18 U.S.C. § 3599(a)(1) *with id.* § 3599(a)(2). A single subsection, Section 3599(e), governs substitution of counsel in both contexts. The same words in Section 3599(e) cannot be given a "different meaning for each category" of case to which they apply. *Clark* v. *Martinez*, 543 U.S. 371, 378-380 (2005). Rather, as a matter of basic statutory interpretation, the court's discretion under Section 3599(e) to replace counsel appointed in federal habeas proceedings under Section 3599(a)(2) must be the same as its discretion to replace counsel appointed in a capital trial under Section 3599(a)(1).

4. Finally, California and its amici States predict a flood of "Clair motions" filed by habeas petitioners seeking unwarranted delays in the proceedings against them by claiming entitlement to new counsel on manufactured or trivial grounds. *E.g.*, Pet. Br. 20-22, 30-31; Florida Br. 1, 17-18, 22-23. This argument rests on a caricature of the decision below. The court of appeals did not hold that the interests of justice *require* appointment of new counsel on the facts of this case or any other. It held rather that the issue was committed to the sound discretion of the district court, which must decide, *after due inquiry*, whether substitution of counsel is appropriate "in the interests of justice." Far from "entitling" a capital defendant to new counsel, that discretionary standard permits the district court to take account of all the considerations the State has advanced against granting a motion for substitution, including the State's interest in finality, the prospect of

unreasonable delay, lack of evidence of a serious breakdown of the attorney-client relationship, and any likelihood that substitution would be pointless in light of the status of proceedings or the weakness of the defendant's claims. Indeed, courts regularly deny substitution (or appointment) of counsel on exactly the sorts of grounds the State advances.[23] And neither California nor the amici States cite any evidence that applying the "interests of justice" standard would aggravate the delaying tactics they envision, even though the "interests of justice" standard has long governed appointment and substitution of counsel in non-capital cases under Section 3006A, and applied expressly in capital

---

[23] *See, e.g.*, *United States* v. *McDaniel*, 995 F. Supp. 1095, 1096-1097 (C.D. Cal. 1998) (denying substitution of counsel under the Section 3006A "interests of justice" standard where motion was filed on eve of trial after multiple continuances, and evidentiary hearing failed to substantiate defendant's allegations of conflict and failure of communication); *see also, e.g.*, *Hunter* v. *Delo*, 62 F.3d 271, 275 (8th Cir. 1995) (no abuse of discretion where court "investigated [petitioner]'s assertions, gave him every opportunity to justify his dissatisfaction, and concluded that there was no good cause for the appointment of new counsel"); *Prime*, 431 F.3d at 1154 (affirming district court's denial of a substitution motion in light of "1) the timeliness of the motion; 2) the adequacy of the district court's inquiry into the defendant's complaint; and 3) whether the asserted conflict was so great as to result in a complete breakdown in communication and a consequent inability to present a defense"); *Felder* v. *Goord*, 564 F. Supp. 2d 201, 220 (S.D.N.Y. 2008) (denying habeas claim that trial court should have ordered substitution of counsel after considering, "the timeliness of the defendant's motion," "the adequacy of the trial court's inquiry into the defendant's complaint about counsel," "whether the attorney/client conflict was so great that it had resulted in 'a total lack of communication preventing an adequate defense,'" and "whether the defendant substantially and unjustifiably contributed to the communication breakdown").

cases before enactment of the predecessor to Section 3599.[24]

II. THE COURT OF APPEALS CORRECTLY APPLIED THE ABUSE-OF-DISCRETION STANDARD

Clair's request for new counsel thus required the district court to make a discretionary determination, based on all the relevant circumstances, whether appointment of new counsel was necessary or appropriate "in the interests of justice." While the State challenges the applicability of that standard, it does not dispute that the district court's denial of Clair's request, like most "issues involving ... supervision of litigation," was subject to review for abuse of discretion. *Pierce* v. *Underwood*, 487 U.S. 552, 558 n.1 (1988); *see also United States* v. *Taylor*, 487 U.S. 326, 335-336 (1988); Pet. Br. 47 & n.23, 53. Nor does the State identify any sound reason for disturbing the court of appeals' straightforward application of that familiar standard of review.

Where a decision is committed to the district court's discretion, "the exercise of [that] discretion ... [must] be informed by an accurate knowledge" of the relevant facts. *Morrissey* v. *Brewer*, 408 U.S. 471, 484 (1972). "One cannot evaluate ... what one has not seen or read." *United States* v. *Curtin*, 489 F.3d 935, 958 (9th Cir. 2007) (en banc). Rather, a proper exercise of discretion requires a decisionmaker to undertake an "informed resolution" of the claim before it. *Murphy* v.

---

[24] The State's petition cited a string of cases for the proposition that the court of appeals' decision would bring "instability" or "gamesmanship" to the process, but none of the cited decisions addressed a motion for replacement of counsel under the "interests of justice" standard. *See* Pet. 22.

Deloitte & Touche Group Ins. Plan, 619 F.3d 1151, 1164 (10th Cir. 2010). Similarly, considering the relevant facts and "clearly articulat[ing] their effect" is necessary "to permit meaningful appellate review." *Taylor*, 487 U.S. at 336; *see also id.* at 335-337, 342-343; *Perdue* v. *Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1676 (2010); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 n.14 (1975). That is especially so where, as here, the court's determination involves a weighing of multiple competing considerations. *See Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 228-229 (1979); *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981).

The district court did none of these things in addressing Clair's June 16, 2005 letter requesting substitution of counsel. When Clair earlier submitted his first letter raising concerns about his relationship with the FPD, the court appropriately directed counsel and the State to respond, and acted (or, rather, decided not to act) only after it had received responses and, in particular, had been advised by Clair's counsel that the matter had been resolved to Clair's satisfaction. JA 33. In sharp contrast, when it received Clair's June 16 letter setting forth additional detail about the deterioration of his relationship with the FPD and new allegations about the FPD's failure to pursue newly discovered physical evidence, the court did not solicit any response from counsel or otherwise undertake to inform itself of the surrounding facts. Instead, it summarily denied Clair's request, offering only a conclusory assertion that the FPD "appear[ed]" to be "doing a proper job" and that "[n]o conflict of interest or inadequacy of counsel [was] shown." JA 61.

That assertion was directly contrary to the allegations in Clair's letter, as supported by Ford's letter (which the court received but may or may not have

read). Clair identified, in specific detail, numerous failures by the FPD to "do[] a proper job," including a "total breakdown" of communication between attorney and client, "conflict[s] of interest," and an unexplained refusal to pursue newly available physical evidence that might bear directly on the identity of Rodgers' killer. JA 62-63, 67-69. The district court's conclusion, it turned out, was also contrary to the views of the FPD, as the court would have learned had it sought counsel's views. The first comment the FPD made to any court following Clair's second letter, only four months after the district court's decision, came in response to an order from the court of appeals and confirmed that "the attorney-client relationship ha[d] broken down to such an extent that substitution of counsel [would be] appropriate." FPD Letter at 1.

Application of abuse-of-discretion review on these facts was straightforward. As the court of appeals determined, "when faced with Clair's request for new counsel, the district court was required at a minimum to ascertain whether the interests of justice required that the request be granted." Pet. App. 3; *see also id.* at 4. That holding merely applied the settled principle that a court's exercise of discretion must rest on due consideration of "all the attending circumstances." *Carlson* v. *Landon*, 342 U.S. 524, 533 (1952); *see also Piper Aircraft*, 454 U.S. at 257; *Morrissey*, 408 U.S. at 484. Confronted with Clair's allegations that the FPD had never looked into the physical evidence collected from the crime scene, and refused to do so even after Ford independently discovered that evidence, the court was obliged to make at least some minimal inquiry by

asking counsel to respond.[25] By failing to seek any response to Clair's allegations so that it could make an informed decision, the court essentially failed to exercise its discretion at all. Pet. App. 5; *see Foman* v. *Davis*, 371 U.S. 178, 182 (1962); *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 103 (1993) (Scalia, J., concurring in part and concurring in the judgment).[26]

The State emphasizes that Judge Snyder, who was assigned to preside over Clair's habeas case after Judge Taylor's retirement, characterized Judge Taylor's

---

[25] That inquiry need not have been onerous. The court could have ordered counsel to submit Clair's and Ford's letters in a form that complied with the local rules and to explain its decision to ignore the physical evidence in spite of Clair's contrary instructions.

[26] Courts have regularly applied this principle in the context of motions for appointment or substitution of counsel, holding that a district court must make enough inquiry to provide a "sufficient basis for reaching an informed decision." *United States* v. *McClendon*, 782 F.2d 785, 789 (9th Cir. 1986); *see also United States* v. *Voigt*, 89 F.3d 1050, 1076 (3d Cir. 1996) (affirming district court's decision not to disqualify counsel on conflict-of-interest grounds where "the record was more than sufficient to enable the district court to make a reasoned and well-informed decision"); *Taylor* v. *Dickel*, 293 F.3d 427, 430 (8th Cir. 2002) ("Failure to provide a hearing, or a thorough explication of the reasons for denying substitute counsel, may constitute abuse of discretion in and of itself."); *United States* v. *Martin-Trigona*, 684 F.2d 485, 490 (7th Cir. 1982) (trial court's "failure to conduct an appropriate inquiry into" need for appointment of counsel was reversible error); *Hunter*, 62 F.3d at 271 ("A district court 'confronted by ... an allegation [of irreconcilable conflict] has an obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction.'"); *Johnson* v. *Gibson*, 169 F.3d 1239, 1254 (10th Cir. 1999) ("The district court is under a duty to 'make formal inquiry into the defendant's reasons for dissatisfaction with present counsel when substitution of counsel is requested.'").

rejection of Clair's renewed request for new counsel as "not a summary denial, but a specific finding that Clair had not justified substitution." Pet. Br. 9. That characterization, however, cannot be supported on this record. Neither Judge Taylor's order nor any other evidence suggests that he knew or considered all of the relevant facts. His decision makes no reference to the "interests of justice" or any other standard, gives no indication that the court made any inquiry into Clair's *pro se* allegations, and provides no record facts or reasoned explanation to support the decision or to permit review.

Relatedly, the State argues at length that "Clair's motion was insufficient on its face to justify substitution of counsel," whether considered under the "interests of justice" standard or the State's alternative tests. Pet. Br. 41 (capitalization altered); *see id.* at 15, 16, 45-53, 56-57. The court of appeals did not reach that question, however, and could not have resolved it in light of the district court's failure to probe the circumstances. Its holding rested only on the district court's "failure to inquire," and Clair's allegations were plainly sufficiently serious to warrant some minimal inquiry. Pet. App. 4.

The State argues that "[t]he district court was not necessarily obligated to conduct further inquiry into Clair's allegations or even to state any findings for the record." Pet. Br. 47 n.23; *see id.* at 40-41, 47-48. But the authorities the State cites are to the contrary. In *United States* v. *Smith*, 282 F.3d 758 (9th Cir. 2002), the court confirmed that "case law favors an inquiry when a party seeks substitute counsel," *id.* at 764, and that "the adequacy of the court's inquiry" is central to abuse-of-discretion review, *id.* at 763. The trial court's failure to conduct such an inquiry concerning the defendant's post-trial motion for substitution of counsel was not an abuse of discretion in that case only because

the court had "already entertained two previous substitution motions" raising identical issues and had already "patiently and exhaustively queried [the defendant]." *Id.* at 763, 765. In *Schell* v. *Witek*, 218 F.3d 1017 (9th Cir. 2000), the issue was not whether the federal habeas court had abused its discretion in denying new counsel, but whether the state trial court's failure to rule on the defendant's motion for new counsel amounted to constitutional error warranting habeas relief. Even in that context, the court held that the state court's "fail[ure] to make an appropriate inquiry" required reversal of the district court's denial of habeas relief and remand for an evidentiary hearing. *Id.* at 1027.[27] None of the cited decisions diminishes the settled principle that "[d]iscretion does not mean decision upon one particular fact or set of facts. It means rather a just and proper decision *in view of all the attending circumstances.*" *Carlson*, 342 U.S. at 532-533 (emphasis added); *see* Pet. App. 4.

Indeed, even under the State's novel interpretation of Section 3599, the district court would still be required to inform itself of the facts, just as it must under the "interests of justice" standard. Application of the State's three-part test would require the same elementary steps described above—*i.e.*, making sufficient inquiry into the relevant facts to determine and articulate whether court-appointed counsel met the statutory

---

[27] The other cited cases (Pet. Br. 40, 48 n.23) similarly concern federal habeas review of state-court decisions and have nothing to do with federal appellate review under the abuse-of-discretion standard. *See Harrington* v. *Richter*, 131 S. Ct. 770, 784 (2011); *Mickens* v. *Taylor*, 535 U.S. 162, 168-176 (2002); *Coleman* v. *Thompson*, 501 U.S. 722 (1991); *Wainwright* v. *Witt*, 469 U.S. 412, 430 (1985); *Wilson* v. *Parker*, 515 F.3d 682, 696 (6th Cir. 2008).

qualifications, labored under a conflict of interest, or had "abandoned" his client. Here, the district court did not undertake those steps, even though Clair's June 16 letter cited a "conflict[] of interest" and essentially alleged abandonment by his counsel. *Supra* pp. 8-10. Thus, even if the district court's discretion were cabined solely by the considerations emphasized by the State, the court of appeals' conclusion—that, on this record, the district court abused its discretion by failing to make sufficient inquiry to inform its exercise—would still be correct.

III. The Remand Order Was Reasonable Under The Circumstances Here

Much of the State's dissatisfaction with the court of appeals' disposition of Clair's case appears to stem not from the legal questions decided by the court, but from the remedy the court fashioned after finding an abuse of discretion. *See, e.g.*, Pet. Br. 46-48, 54-61. The court of appeals' remedial order, however, was "the most reasonable solution" to an unusual problem posed by the idiosyncratic facts of this case. Pet. App. 6.

In the ordinary case, as the State suggests, the proper course where a district court failed to give adequate consideration to a request for new counsel might well be a remand for the district court to undertake the appropriate inquiry. Pet. Br. 46-47, 56, 57-58. The court of appeals did not hold otherwise. In this particular case, however, such a remand would have made no sense. At the outset of Clair's appeal, the court of appeals, having been advised by Clair and the FPD of a total breakdown in the attorney-client relationship, had already ordered the appointment of new counsel, without objection by the State. That new lawyer had then spent nearly five years acquainting himself with the

complicated facts of the case and litigating it in various respects. In these unique circumstances, it was only sensible to "treat Clair's current counsel as if he were the counsel who *might* have been appointed" at the time Clair made his request in the district court and to remand for the district court to determine not whether new counsel should have been appointed earlier, but whether the original disposition of Clair's habeas petition should be altered in any respect based on whatever arguments current counsel might advance for why it would be appropriate to allow the submission of new evidence or assertion of new claims before judgment. Pet. App. 6 (emphasis added).[28]

Even if AEDPA applied in this case (which it does not), nothing in the court's specially tailored remedial order would permit any "end-run" around that statute's strictures. Pet. Br. 15, 30-31, 46. The court's order does not automatically permit Clair to amend his petition, adduce new evidence, or add new claims. It requires him to apply to the district court for leave to do so. The court of appeals directed the district court to "consider" any such submissions "as if they had been made prior to the ruling on the writ," applying the usual standards prescribed by Federal Rule of Civil Procedure 15(a). Pet. App. 6; *see Mayle* v. *Felix*, 545 U.S. 644, 655 (2005). It will be for the district court to decide in the first instance whether to accept any amendment to Clair's petition or supplementation of the supporting record.

---

[28] The court's order to leave current counsel in place was thus consistent with Congress's intent in Section 3599 to "emphasize[] continuity of counsel." *Harbison*, 129 S. Ct. at 1490; *cf.* Pet. Br. 32.

Rule 15(a) does not "entitle" Clair to reopen his case. To amend his petition he would be required to persuade the district court that "justice so requires." Fed. R. Civ. P. 15(a)(2); *see, e.g.*, 1 Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 17.2 , at 931-932 (6th ed. 2011). For example, Clair might seek to add a claim that the rediscovered physical evidence, once properly tested and compared, sufficiently demonstrates his "actual innocence" to render his execution unconstitutional. *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993). Or he might argue that it supports an amended ineffective-assistance claim based on trial counsel's entry into unfavorable evidentiary stipulations, or an amended *Brady* claim based on the State's failures to make required disclosures. The court could inquire on remand into whether reopening was warranted either because the State suppressed important physical evidence or because Clair's counsel refused to follow up once that evidence was found. The State contends that these claims lack substantive merit, but that is not a contention that this Court can or should address.[29] If the State is correct, the district court will presumably deny any motion to amend as futile. Similarly, the court could deny a motion if it finds "bad faith,

---

[29] As discussed, the thrust of Clair's efforts since the district court denied his habeas petition has been to seek an investigation into the physical evidence that the FPD failed to pursue. *Supra* pp. 10-14. Although Clair has informed the lower courts of certain new developments—including DNA test results indicating that one or more unidentified males other than Clair had sexual contact with Rodgers and may have been present at the scene of her murder, and revelations that police suspected a link between Rodgers' murder and a similar homicide that occurred one night earlier while Clair was in jail—the underlying evidence is incomplete, and none of it is in the record below or before this Court.

undue delay, [or] prejudice" to the State. *Bonin* v. *Calderon*, 59 F.3d 815, 845 (9th Cir. 1995); *see also Foman*, 371 U.S. at 182; *Stafford* v. *Saffle*, 34 F.3d 1557, 1560-1562 (10th Cir. 1994); *Espey* v. *Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984). The Rule 15 standard thus fully accommodates the State's concerns for finality of state judgments and the possibility of dilatory motives. At the same time, remand and a chance to *seek* amendment will properly ensure that the district court's abuse of discretion in ruling on Clair's substitution request without making due inquiry does not unfairly prevent Clair from advancing substantial claims that might not have been raised before precisely because of the problems with Clair's counsel that ultimately led him to request a change.

The State contends that any attempt by Clair to add new claims based on the newly available physical evidence should be treated as a second or successive petition under AEDPA, 28 U.S.C. § 2244. *See* Pet. Br. 20, 30-31, 46. In the court of appeals, however, the State recognized that if the district court had appointed new counsel when Clair requested it, "[a]ny amendment to the Petition would [have] be[en] subject to the discretion of the court" under the Rule 15 standard for pre-judgment amendments. State's Suppl. Br. 57, Dkt. 83, *Clair* v. *Ayers*, No. 05-99005 (9th Cir. July 14, 2009) (citing Fed. R. Civ. P. 15(a)(2) and *Foman*, 371 U.S. at 182). By adopting that standard, the court of appeals' order does no more than restore Clair as closely as possible to the position he would have been in but for the district court's abuse of discretion.

The State also contends the court of appeals should have pretermitted the district court's consideration of any motion to amend in light of the district court's intervening ruling on Clair's Rule 60(b) motion. Pet. Br. 59-

60. But the district court ruled on that motion without the benefit of any real factual record. By denying Clair's request for new counsel, the district court had cut off Clair's opportunity to investigate the physical evidence and develop the claims it might support. A principal purpose of Clair's motion under Rule 60(b) was thus to seek time and funding to examine the evidence and develop those claims properly. *Supra* pp. 10-12. But the court denied that motion before Clair's counsel had any opportunity to examine the evidence or have it properly analyzed. Moreover, that motion was decided under a different and more stringent standard, and its denial does not foreclose the possibility of relief under Rule 15(a)(2). The district court's denial of the Rule 60(b) motion on an undeveloped record is thus no basis for denying Clair the carefully tailored remedy that is otherwise appropriate in the unusual posture of this case.

For similar reasons, the court of appeals could not meaningfully evaluate whether the district court's abuse of discretion "affected Clair's substantial rights," even if it were required to do so. *Cf.* Pet. Br. 58.[30] Nor could this Court properly make such a determination. The State disputes whether the newly available physical evidence can support a claim for habeas relief, but that question was not before the court of appeals, is not before this Court, and cannot be evaluated on the present record. Remanding for the district court to assess in the first instance whether, in effect, Clair was prejudiced by

---

[30] The State erroneously cites (Pet. Br. 58) the harmless error standard of *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993). The *Brecht* standard governs whether an error of the trial court was sufficiently prejudicial to warrant habeas relief. It does not address federal appellate review of a district court's decision under the abuse-of-discretion standard.

the district court's uninformed denial of his request for substitution thus was and is the best way to protect both the State's interests and Clair's statutory rights.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

JOHN R. GRELE
LAW OFFICES OF
JOHN R. GRELE
149 Natoma Street
Third Floor
San Francisco, CA 94105

DAVID W. FERMINO
149 Natoma Street
Third Floor
San Francisco, CA 94105

SETH P. WAXMAN
Counsel of Record
EDWARD C. DUMONT
CATHERINE M.A. CARROLL
ARON B. GOETZL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022

NOVEMBER 2011

REPLY BRIEF

NOV 29 2011
OFFICE OF THE CLERK

No. 10-1265

In The Supreme Court of the United States

MICHAEL MARTEL, Warden,

Petitioner,

v.

KENNETH CLAIR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BARRY J.T. CARLTON
Supervising Deputy Attorney General
WARD A. CAMPBELL*
Supervising Deputy Attorney General
**Counsel of Record*
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street
P.O. Box 944255
Sacramento, California 94244-2550
(916) 324-5251
ward.campbell@doj.ca.gov
Counsel for Petitioner

Library of the United States Law Library

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. THE ISSUE IN THIS CASE IS THE APPROPRIATE STANDARD FOR SUBSTITUTION OF APPOINTED COUNSEL IN CAPITAL HABEAS CASES UNDER §3599 4

II. SUBSTITUTION MOTIONS SHOULD BE LIMITED TO CIRCUMSTANCES AMOUNTING TO "DEPRIVATION OF QUALIFIED COUNSEL" UNDER §3599 AND SHOULD NOT BE SUBJECT TO THE NINTH CIRCUIT'S EXPANSIVE "INTERESTS OF JUSTICE" STANDARD 6

A. §3599 Limits Substitution Motions to Actual Deprivation of the Right to Representation by Statutorily Qualified Legal Counsel 7

B. The "Interests of Justice" Standard of §3006A(c) and the Ninth Circuit's Definition of that Standard Are Inapplicable to Substitution Motions under §3599(e) 14

1. Congress Intentionally Omitted the "Interests of Justice" Standard from §3599 14

2. The Ninth Circuit Misapplied the "Interests of Justice" Standard 18

TABLE OF CONTENTS – Continued

Page

III. UNDER ANY REASONABLE STANDARD, THE NINTH CIRCUIT ERRED IN VACATING THE JUDGMENT DENYING CLAIR'S HABEAS CORPUS PETITION AND IN REMANDING HIS CASE FOR FURTHER PROCEEDINGS ON HIS FIRST PETITION 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) 25

Anders v. *California*, 386 U.S. 378 (1967) 5

Barefoot v. *Estelle*, 463 U.S. 880 (1983) 18

Bonin v. *Vasquez*, 999 F.2d 425 (9th Cir. 1993) ..... *passim*

Chaney v. *Lewis*, 801 F.2d 1191 (9th Cir. 1986) 20

Coleman v. *Thompson*, 501 U.S. 722 (1993) 8, 9

Dickerson v. *United States*, 530 U.S. 428 (2000) 14

District Attorney's Office for the Third Judicial District v. *Osborne*, 557 U.S. 52, 129 S.Ct. 2308 (2009) 5, 8, 21

Duncan v. *Walker*, 533 U.S. 167 (2001) 15

Felder v. *Goord*, 564 F.Supp.2d 201 (S.D.N.Y. 2008) 19

Felker v. *Turpin*, 518 U.S. 651 (1996) 14

Green v. *Scott*, 863 F.Supp. 376 (N.D.Texas 1994) 17

Harbison v. *Bell*, 556 U.S. 180, 129 S.Ct. 1481 (2009) 10, 11

Harris v. *Vasquez*, 949 F.2d 1497 (9th Cir. 1990) ..... *passim*

Holland v. *Florida*, ___ U.S. ___, 130 S.Ct. 2549 (2010) 21

House v. *Bell*, 547 U.S. 518 (2006) 26

In re Gonzales, 623 F.3d 1242 (9th Cir. 2010) 20

TABLE OF AUTHORITIES – Continued

Page

In re Manville Forest Products Corp., 896 F.2d 1384 (2d Cir. 1990) 16

Johnson v. *Gibson*, 169 F.3d 1239 (10th Cir. 1999) 19

Jones v. *Barnes*, 463 U.S. 745 (1983) 21

Lawrence v. *Florida*, 549 U.S. 327 (2007) 9

Lindh v. *Murphy*, 521 U.S. 320 (1997) 14

Lockhart v. *Fretwell*, 506 U.S. 364 (1993) 25

McCleskey v. *Zant*, 499 U.S. 467 (1991) 8, 9

McFarland v. *Scott*, 512 U.S. 849 (1994) 20, 21

Mickens v. *Taylor*, 535 U.S. 162 (2002) 8

Nelson v. *Campbell*, 541 U.S. 637 (2004) 7

Pennsylvania v. *Finley*, 481 U.S. 551 (1987) 5, 8, 9, 22

Penson v. *Ohio*, 488 U.S. 75 (1988) 8

People v. *Axell*, 235 Cal.App.3d 836, 1 Cal.Rptr.2d 411 (1991) 25

Rohan ex rel. Gates v. *Woodford*, 334 F.3d 803 (9th Cir. 2003) 20

Ryan v. *Gonzales*, No. 10-930 20

Smith v. *Robbins*, 528 U.S. 259 (2000) 8

Strickland v. *Washington*, 466 U.S. 668 (1984) 8, 20

United States v. *Barcelon*, 833 F.2d 894 (10th Cir. 1987) 19

United States v. *Berger*, 375 F.3d 1223 (11th Cir. 2004) 20

TABLE OF AUTHORITIES – Continued

Page

United States v. *Bergman*, 599 F.3d 1142 (10th Cir. 2010) 8

United States v. *Cronic*, 466 U.S. 648 (1984) 8

United States v. *Eskridge*, 445 F.3d 930 (7th Cir. 2006) 20

United States v. *Gonzalez*, 113 F.3d 1026 (9th Cir. 1997) 18

United States v. *John Doe No. 1*, 272 F.3d 116 (2d Cir. 2001) 17

United States v. *Lane*, 474 U.S. 438 (1986) 20

United States v. *McClendon*, 782 F.2d 785 (9th Cir. 1986) 6

United States v. *McDaniel*, 995 F.Supp. 1095 (C.D.Cal. 1998) 18

United States v. *Parker*, 469 F.3d 57 (2d Cir. 2006) 19

United States v. *Nobles*, 422 U.S. 425 (1975) 25

United States v. *Taylor*, 652 F.3d 905 (8th Cir. 2011) 19

Vermont v. *Brillon*, 556 U.S. ___, 129 S.Ct. 1283 (2009) 17

Wainwright v. *Torna*, 455 U.S. 586 (1982) 9

Wainwright v. *Witt*, 469 U.S. 412 (1985) 6

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

United States Constitution

Sixth Amendment ..... *passim*

STATUTES

18 U.S.C.

§3006A ..... *passim*

§3599 ..... 13, 21, 22

§3599(e) ..... *passim*

28 U.S.C.

§2254(i) 12, 13, 14

§2261(e) 12, 13

Anti-Drug Abuse Act of 1988, 102 Stat. 4181 15

Anti-Terrorism and Effective Death Penalty Act [AEDPA] 4, 12, 13, 24

Federal Rules of Civil Procedure

Rule 631 23

OTHER AUTHORITIES

Annot., 157 A.L.R. 1225 (1945) 16

PETITIONER'S REPLY BRIEF ON THE MERITS

INTRODUCTION

The Constitution does not provide for counsel on habeas corpus. Congress, however, has chosen to create that right for capital habeas petitioners. This case is about the standard the federal district court should have applied to respondent Clair's request for substitution of appointed counsel in his habeas corpus capital case. The governing statute, 18 U.S.C. §3599(e), contains no explicit standard for that determination.

In this Reply Brief, the State reiterates that a federal court need replace appointed counsel only when the petitioner has been deprived of the statutory right to counsel under §3599. These circumstances include when counsel fails to meet the statutory qualifications for appointment, when counsel has a disabling conflict of interest, or when counsel has abandoned the client.

In 2005, the district court was on the verge of deciding Clair's habeas corpus petition when Clair complained about his team of attorneys. The court denied Clair's motion for new counsel. It found that Clair's appointed counsel, the Federal Public Defender, was doing a "proper job" and that Clair had not shown a conflict of interest nor any inadequacy. J.A. 61-72. The court had plenty of data to work with in making this determination: it had presided over the case for more than a decade, a time involving years of

motion practice, years of discovery, a hard-fought motion for an evidentiary hearing, a two-day evidentiary hearing, extensive post-hearing briefing of the issues by both parties, and an earlier request for new counsel by Clair (over State opposition). Pet.App. 21-23; J.A.18-35. After rejecting Clair's attempt to get new counsel, the court denied Clair's petition for writ of habeas corpus challenging his conviction and death sentence for the 1984 murder of Linda Rodgers.

Over five years later, in 2010, the Ninth Circuit announced that the district court had acted without sufficient understanding of the case. In order to reach this remarkable conclusion, the panel reached to 18 U.S.C. §3006A's "interests of justice" standard for substitution of counsel in non-capital cases and purported to apply it to Clair's motion for new counsel. It acknowledged that Clair did not even contend his habeas team had been constitutionally ineffective.[1] But, by using an "interests of justice" standard, the panel concluded that the district court abused its discretion by not inquiring about Clair's complaint that his counsel had failed to provide "meaningful assistance" by investigating physical evidence that, because of new technologies, could be subjected to forensic testing not available at the time of his 1987 trial. Pet.App. 4-5. It gave no weight to the fact that Clair's counsel were statutorily qualified, did not

---

[1] Clair does not assert that his prior counsel were ineffective. Opp. Pet.Cert. 15.

have any conflicts of interest, had filed a substantial habeas petition, and had conducted an evidentiary hearing on Clair's behalf. The opinion did not even analyze the actual merits of Clair's concerns about his counsel. As even Clair concedes, the Ninth Circuit's standard of adjudication exceeded "what the Constitution would require" for criminal defendants at trial. Resp.Br. 30.

Clair also concedes that the Ninth Circuit did not follow the "ordinary" and "proper" course of remanding Clair's case for inquiry about Clair's concerns. Resp.Br. 39. Instead, the Ninth Circuit peremptorily appointed new district court counsel retroactively, vacated the denial of Clair's petition, and offered Clair the opportunity to relitigate his previously unsuccessful federal petition.

Thus, after 17 apparently pointless years in the federal courts, Clair's case returned to square one in the district court so that he could try to add new claims to his first petition and so that the district court might now "rule[ ] anew on Clair's [previously denied] habeas petition." Pet.App. 6. Although Clair coyly suggests that the district court could still disallow the new claims (Resp.Br. 40-43), the point remains that litigation on the first petition now resumes afresh. Although there never was any finding that Clair's former counsel were incompetent or ineffective, new counsel now has the opportunity to litigate new claims and relitigate old ones.

The Ninth Circuit's ruling erroneously allows Clair to evade AEDPA's restrictions on successive petitions. California's interest in the finality of its judgments, and the principles of comity, and federalism are compromised. Capital prisoners now have a new avenue to delay their cases. Justice for the murder of Linda Rodgers, now over 27 years in the past, is again postponed. None of this was proper.

I. THE ISSUE IN THIS CASE IS THE APPROPRIATE STANDARD FOR SUBSTITUTION OF APPOINTED COUNSEL IN CAPITAL HABEAS CASES UNDER §3599

The specific question presented in this case goes to whether Clair had a legal right to new habeas counsel because he was dissatisfied with his lawyers' alleged failure to investigate "potentially important" evidence. Clair agrees that the answer to that question is "No." Resp.Br. 1. But he then claims that this case does not really present that question. Instead, he mischaracterizes the Ninth Circuit's decision as no more than a finding that the district court had abused its discretion by failing to investigate Clair's complaints about his counsel. Clair, however, trivializes the implication of the Ninth Circuit's disposition, which now gives him an opportunity to reopen his district court proceedings without satisfying AEDPA's restrictions on successive petitions – even though it has now been 18 years since he initiated unsuccessful federal habeas proceedings – *and* even though there

was never any showing that his habeas counsel had inadequately represented him.

Clair dodges the point. The reason that the answer to the question presented is "No" is because (1) as he admits, the Constitution did not require it, and (2) his allegations were insufficient to justify new counsel under §3599(e). The Ninth Circuit's decision to simply appoint new counsel without even remanding Clair's case for an inquiry about his allegations against his old counsel amounts to a finding that Clair's request was sufficient as a matter of law. Yet, as California explained in its opening brief, the right to replace statutorily appointed counsel cannot be based on allegations of dissatisfaction relating to performance. Clair does not have the right to effective assistance of counsel on habeas corpus, even if that counsel is statutorily appointed. *Pennsylvania* v. *Finley*, 481 U.S. 551, 553, 555-559 (1987) (state created right to appointed counsel does not include right to procedures under *Anders* v. *California*, 386 U.S. 378 (1967)); *Bonin* v. *Vasquez*, 999 F.2d 425, 427-431 (9th Cir. 1993) (motion of federal habeas counsel to withdraw denied because there is no right to effective assistance of counsel on habeas). At most, he is entitled to substitution only when his appointed representation is "fundamentally inadequate" to vindicate his statutory right to counsel. See *District Attorney's Office for the Third Judicial District* v. *Osborne*, 557 U.S. 52, 129 S.Ct. 2308, 2320 (2009).

As explained in the opening brief, the statutory scheme calls for representation by qualified counsel, nothing more. Habeas representation is fundamentally

inadequate in the context of the statutory scheme when it amounts to no representation at all, which is an effective deprivation of counsel. Pet.Br. 17-43. Accordingly, when the district court received Clair's criticisms of his counsel and denied the substitution motion based on the record, the district court did all that was required because Clair complained merely about his counsel's decisions, rather than alleging that he had been deprived of statutorily authorized counsel. *United States* v. *McClendon*, 782 F.2d 785, 789 (9th Cir. 1986) ("McClendon's description of the problem and the judge's own observations provided a sufficient basis for reaching an informed decision [denying substitution motion]. . . .").[2]

II. SUBSTITUTION MOTIONS SHOULD BE LIMITED TO CIRCUMSTANCES AMOUNTING TO "DEPRIVATION OF QUALIFIED COUNSEL" UNDER §3599 AND SHOULD NOT BE SUBJECT TO THE NINTH CIRCUIT'S EXPANSIVE "INTERESTS OF JUSTICE" STANDARD

Clair argues that the Ninth Circuit's version of §3006A's "interests of justice" standard is superior to the "deprivation of counsel" standard for substitution

---

[2] Clair criticizes the district court for not explaining its denial of Clair's motion. The record is clearly to the contrary. J.A. 61-72. No more was required. See, *e.g.*, *Wainwright* v. *Witt*, 469 U.S. 412, 430 (1985) (unnecessary to announce conclusion when finding is evident from the record).

propounded in California's opening brief in terms of supporting authority and practicality. However, his comparison cannot withstand scrutiny. The Ninth Circuit's "interests of justice" standard is inconsistent with the Congressional scheme for providing counsel in capital habeas matters. In the capital habeas context, however, the "deprivation of counsel" standard for substitution of counsel is naturally derived from Congress's scheme for appointment of qualified counsel under §3599, from canons of statutory construction, and from this Court's considerable habeas corpus and death penalty jurisprudence. That scheme and that case law take proper account of the States' "significant interest" in finality as well as in principles of comity and federalism. *Nelson* v. *Campbell*, 541 U.S. 637, 644 (2004) (and cases cited).

A. §3599 Limits Substitution Motions to Actual Deprivation of the Right to Representation by Statutorily Qualified Legal Counsel

The principal premise of California's opening brief is that Clair's substitution motion was legally insufficient because Clair did not allege anything suggesting he had been deprived of his §3599 right to counsel. Nothing he asserted suggested that his appointed counsel were statutorily unqualified, that they had a conflict of interest that adversely affected their representation, or that they had abandoned him. In short, nothing he asserted suggested he had

been deprived of the counsel guaranteed him by §3599. Since Clair was never deprived of the rights given him by §3599, he was not entitled to new counsel.

There is nothing novel about a "deprivation of counsel" standard. It is analogous to actual or constructive denial of counsel under the Sixth Amendment. Pet.Br. 33-34; *Smith* v. *Robbins*, 528 U.S. 259 (2000) (prejudice presumed when counsel denied or burdened by actual conflict of interest); *United States* v. *Bergman*, 599 F.3d 1142, 1147 (10th Cir. 2010) (representation by non-lawyer is automatically ineffective). It is also consistent with this Court's dividing line between claims of denial of counsel and claims of ineffective assistance of counsel. *Strickland* v. *Washington*, 466 U.S. 668, 692-693 (1984) (citing *United States* v. *Cronic*, 466 U.S. 648, 659 & n. 25 (1984)); *Mickens* v. *Taylor*, 535 U.S. 162, 166-167 (2002); *Penson* v. *Ohio*, 488 U.S. 75, 88 (1988).

There is no constitutional or statutory right to effective assistance of counsel on habeas corpus. *McCleskey* v. *Zant*, 499 U.S. 467, 495 (1991); *Coleman* v. *Thompson*, 501 U.S. 722, 754 (1993); *Pennsylvania* v. *Finley*, 481 U.S. at 556. Hence, a motion for substitution of counsel based on the actual deprivation of statutory counsel is adequate to protect the actual underlying right – the right to appointment of qualified counsel. See *District Attorney's Office for the Third Judicial District* v. *Osborne*, 129 S.Ct. at 2320.

Congress enacted §3599 amid the setting of a legal landscape in which the statutory creation of a right to counsel for capital habeas corpus petitioners would not automatically create a concomitant right to effective assistance of counsel. *Coleman* v. *Thompson*, 501 U.S. at 752-754, citing *Pennsylvania* v. *Finley*, 481 U.S. at 553, 556-559, and *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982) (representation by retained or appointed counsel, when there is no constitutional right to counsel, does not create right to effective assistance of counsel); see *McCleskey* v. *Zant*, 499 U.S. at 495. Since Congress had no reason to believe it was creating a right to effective assistance of counsel when it enacted §3599, there is no reason to conclude Congress intended to create a right to substitution of counsel on the basis of ineffectiveness. *Bonin* v. *Calderon*, 999 F.2d at 427-431; (rejecting appointed counsels' withdrawal motion because there was no right to effective assistance of counsel on habeas and, therefore, their alleged ineffectiveness could not be "cause" for abuse of the writ); *Lawrence* v. *Florida*, 549 U.S. 327, 337 (2007) (state not accountable for mistakes of appointed counsel on collateral review).

Nor did Congress explicitly create a right to effective assistance of habeas counsel. See *Harris* v. *Vasquez*, 949 F.2d 1497, 1523 (9th Cir. 1990) (California did not create right to collateral judicial review of the competency of state-paid defense psychiatrists). And for good reason. Congress could reasonably foresee that creating a right to effective assistance of counsel

on habeas would have the "actual impact" of causing an "infinite continuum of litigation" as each succeeding habeas counsel challenged the performance of the predecessor. *Bonin* v. *Vasquez*, 999 F.2d at 430. Accordingly. Congress would not have contemplated substitution motions based on alleged unsatisfactory performance such as the request Clair filed in this case. Such motions would be no more than inquiries into the effectiveness of appointed counsel with the inherent risk of litigation of new and relitigation of old claims by succeeding counsel. Instead of opening this Pandora's Box, Congress created a system that provided for the appointment of qualified counsel and provided them with the tools and the time for the adequate representation of their clients.

It is true, of course, that §3599(e) authorizes motions for replacement of appointed counsel. As this Court explained in *Harbison* v. *Bell*, 556 U.S. 180, 129 S.Ct. 1481 (2009), §3599(e) also establishes the duration of counsel's appointment and "emphasizes continuity of counsel. . . ." *Id.* at 1490. But, in allowing for the possibility that this continuous representation will be interrupted by a motion for new counsel, §3599(e) merely requires that the replacement have the required statutory qualifications. It does not set out an explicit standard for replacing counsel.

Contrary to Clair's reading, the "deprivation of counsel" standard for substitution flows naturally from both the text and substance of §3599. Counsel is replaced only when a petitioner is not being represented by qualified counsel under §3599. A more

expansive standard increases the potential for disrupting representation in subsequent proceedings. including state clemency actions. Resp.Br. 31; Amici Curiae Brief for Florida and 25 States 22.

Even more important, Congress's establishment of demanding qualification standards for §3599 counsel supports limitations on substitution motions. As described in both merits briefs filed in this case, §3599 imposes "more stringent" qualifications for appointment of counsel than under §3006A. It also pays higher compensation, provides reasonably necessary services, permits second counsel, and authorizes appointment of counsel even before a petition for writ of habeas corpus is actually filed. Further, appointment of federal counsel comes only after a petitioner has already been tried in state court, appealed his conviction, and exhausted his remaining claims on state collateral review. *Harbison* v. *Bell*, 129 S.Ct. at 1489.

These elements point to the conclusion that a substitution motion should not be based on a petitioner's complaints about collateral counsel's performance. Congress created a "more solicitous" representation system of "well qualified counsel" (Resp.Br. 21) to ensure that capital petitioners were adequately represented by qualified counsel and to avoid endless litigation about competence. Congress has reasonably decided that a habeas petitioner's interests will, as a realistic matter, be sufficiently protected by the appointment of extra-qualified

counsel, and the States' interest in its judgment will be honored in turn by foreclosing litigation about the effectiveness of federal counsel. Congress's wisdom is illustrated by Clair's case, where the court below was not able to say that the Federal Public Defender was ineffective. Substitution motions based on actual deprivation of that counsel sufficiently protect a petitioner's substantive right to appointment of qualified counsel under §3599.

Finally, Clair cannot refute the negative implication in AEDPA supporting the conclusion that substitution of counsel in his case could not be "on the basis of the ineffectiveness or incompetence of counsel. . . ." Pet.Br. 27-28. For all cases, except for capital cases proceeding under the so-called "opt in" provisions of Chapter 154 of Title 28, "the ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. §2254(i). The same language for capital cases is in Chapter 154, but with an exception: "This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings." 28 U.S.C. §2261(e).[3]

---

[3] As argued in petitioner's opening brief, AEDPA informs the district court's exercise of discretion regarding Clair's

(Continued on following page)

This is the only time Congress has spoken to the standard for substitution of appointed counsel. Clair states that this second sentence in §2261(e) "merely negates any possible implication that Congress intended to preclude trial courts from removing and replacing incompetent counsel." Resp.Br. 29. This is true. But that same "implication" indicates that Congress specifically eliminated "ineffectiveness or incompetence" of habeas counsel as a basis for substitution of habeas counsel in non-Chapter 154 cases such as Clair's. Further, Congress's view would have been shaped by this Court's holdings that there is no constitutional right of effective assistance of counsel on habeas (which it codified in §2254(i)), necessarily implying that there likewise is no right to discharge appointed counsel on habeas on grounds of incompetence or ineffectiveness.[4] Thus, where Congress

---

substitution motion, even though Clair's habeas petition was filed pre-AEDPA. Pet.Br. 18-20 & n. 11. AEDPA explicitly references §3599. *Id.* at 24. Clair's counsel was appointed after AEDPA's effective date under the authority of a non-AEDPA statute, §3599. It is appropriate to consider Congress's intent in AEDPA as it bears on post-AEDPA counsel appointments.

[4] The State argued that Congress's codification of this Court's holdings that ineffectiveness of collateral counsel in §2254(i) could not be grounds for relief was an idle act unless Congress intended to include other forms of relief as well, such as reopening litigation or substituting counsel based on ineffectiveness. Pet.Br. 29. Clair responds that there is nothing remarkable about Congressional codification of this Court's holdings and cites several examples, including the exhaustion and evidentiary hearing statutes. Resp.Br. 28 & n. 21. The difference is that in Clair's examples, Congress was simply exercising its

(Continued on following page)

wanted to create a right to replace ineffective or incompetent habeas counsel, it chose to insert specific language to that effect in Chapter 154. Clair cannot escape the fact that Congress included no such language in §2254(i) regarding cases not governed by Chapter 154 – such as his. *Lindh* v. *Murphy*, 521 U.S. 320, 329-336 (1997) (specific statutory language that Chapter 154 applied to pending cases and absence of similar language for amendments to Chapter 153 created "negative implication" that amendments to Chapter 153 did not apply to pending cases).

B. The "Interests of Justice" Standard of §3006A(c) and the Ninth Circuit's Definition of that Standard Are Inapplicable to Substitution Motions under §3599(e)

1. Congress Intentionally Omitted the "Interests of Justice" Standard from §3599

Taking his cue from the Ninth Circuit's opinion, Clair touts the application of the "interests of justice" standard for substitution of counsel in non-capital cases under §3006A(c) to motions for substitution under §3599. Apparently the Ninth Circuit defines "interests of justice" in terms of whether appointed

---

power to define the "proper scope" of the writ. *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996). Section 2254(i) is different – to the extent it codifies a constitutional doctrine, it cannot bind this Court. See, *e.g.*, *Dickerson* v. *United States*, 530 U.S. 428, 437 (2000). Congress surely intended more than an empty gesture.

counsel provides "meaningful assistance." Pet.App. 4. Clair defines "interests of justice" by arguing that the district court was generally required "to make a discretionary determination, based on all the relevant circumstances. . . ." Resp.Br. 16. He otherwise refers to various district court decisions applying the "interests of justice" standard at trial or in the context of the Sixth Amendment right to counsel. Resp.Br. 23 n. 16, 32 n. 23.

But there is no reason to conclude that Congress intended for the "interests of justice" standard to apply to §3599(e) substitution motions. Clair concedes that "interests of justice" is ubiquitous in federal statutes. Resp.Br. 24. As Clair also points out, the §3006A "interests of justice" standard applied to substitution motions prior to the passage of §3599. However, Congress did not reinsert that standard into §3599. *Id.* at 20-21. The original statute containing what is now §3599, the Anti-Drug Abuse Act of 1988, 102 Stat. 4181, also included multiple invocations of the "interests of justice" standard, but it omitted that standard in the section of the Act pertaining to substitution of counsel in capital cases. *Id.* at 4492, 4493, 4496, 4497, 4514. This Court must presume that Congress intentionally left this language out of §3599. *Duncan* v. *Walker*, 533 U.S. 167, 173 (2001).

It is also understandable why Congress excluded "interests of justice" from §3599. Basically, the "interests of justice" standard is a "broad and flexible

standard which must be applied on a case-by-case basis." *In re Manville Forest Products Corp.*, 896 F.2d 1384, 1391 (2d Cir. 1990). The omission of a generalized "interests of justice" standard from §3599 was an explicit message from Congress that a narrower, more refined standard should apply to substitution motions under that section – a specialized statutory scheme for appointment of counsel in capital cases that is totally separate from the generalized §3006A scheme. Section 3599 has specific standards for qualified counsel in capital cases, more money, more resources, more counsel, more time to prepare, and continuous representation. Capital litigation uniquely incentivizes manipulation and delaying tactics. Section 3599(e)'s standard for substitution should match the specificity and specialty of the overall Congressional plan and its capital context.

Nor is Clair's §3006A standard superior to the "deprivation of counsel" standard. As noted, the "interests of justice" standard is very general and far from clear. There is nothing unusual about a "deprivation of counsel" standard, since it is akin to "denial of counsel" under the Sixth Amendment. Furthermore, the Ninth Circuit's expansive §3006A "interests of justice" standard will introduce a disruptive procedure into federal habeas proceedings, the "Clair motion" – like the motion in this case, that is already a frequent source of extensive litigation and delay in the trial courts. See Annot., 157 A.L.R. 1225 (1945); Pet.Br. 21-22; see, *e.g.*, *Vermont* v. *Brillon*, 556 U.S.

___, 129 S.Ct. 1283, 1292 (2009) (defendant delayed and disrupted proceedings with substitution motions); *Green* v. *Scott*, 863 F.Supp. 376, 379 n. 6 (N.D.Texas 1994) ("attorneys providing representation to death penalty defendants often become [victims] of tactics to delay execution of the sentence. . . ."); *United States* v. *John Doe No. 1*, 272 F.3d 116, 122 (2d Cir. 2001) (warning against obstructive substitution motions).

Clair blithely assumes, as did the Ninth Circuit, that even though Congress omitted the "interests of justice" standard from §3599(e), it intended for condemned inmates to have the same exact opportunity to substitute counsel as their non-capital counterparts. Of course, this Court has never defined the "interests of justice" standard for substitution of statutorily appointed counsel in non-capital cases. Since inmates, in general, are not entitled to effective assistance of statutorily appointed counsel on habeas, it is questionable whether non-capital inmates would have any greater right to replace their counsel than capital inmates insofar as they may be dissatisfied with their counsel. See *Harris* v. *Vasquez*, 949 F.2d at 1514 n. 13; *Bonin* v. *Vasquez*, 999 F.2d at 427-431 (denying withdrawal motions under §3006A).

Alternatively, it would not be remarkable if Congress had established a different, more stringent standard for substituting counsel in capital habeas cases. As the State argued, Congress established a special, "high-end" system in capital habeas cases

for the appointment of counsel, one that demanded higher qualifications from counsel, and that provided these extra-qualified counsel with more resources than their colleagues representing non-capital petitioners. This regime contemplates continuous representation all the way through the clemency and competency process. Condemned inmates have a singular incentive to impede the progress of their cases with disruptive tactics. It was reasonable for Congress to balance its generosity in creating a right to counsel by limiting motions for substitution of appointed counsel.[8]

2. The Ninth Circuit Misapplied the "Interests of Justice" Standard

Even if the §3006A "interests of justice" standard applied to §3599(e) substitution motions, the Ninth Circuit misapplied that standard. Under §3006A, federal district courts substitute appointed counsel at all stages of criminal and related proceedings. Substitution at the criminal trial level protects the criminal defendants' Sixth Amendment right to effective assistance of counsel. See, *e.g.*, *United States* v. *Gonzalez*, 113 F.3d 1026, 1028-1029 (9th Cir. 1997) (cited with approval in *United States* v. *McDaniel*, 995 F.Supp.

---

[8] It is not unusual for capital inmates to face more stringent procedural requirements than non-capital inmates. *Barefoot* v. *Estelle*, 463 U.S. 880, 887-896 (1983). And Congress's enactment of Chapter 154 of AEDPA is specifically directed at facilitating capital collateral review.

1095, 1096-1097 (C.D.Cal. 1998)); *Felder* v. *Goord*, 564 F.Supp.2d 201, 220 (S.D.N.Y. 2008) ("a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict."). Defendants on trial are not entitled to substitution merely because they lack a "meaningful relationship" with counsel or disagree with counsel about tactical decisions. *United States* v. *Taylor*, 652 F.3d 905, 908 (8th Cir. 2011). Nor are they entitled to choose their counsel. *United States* v. *Paker*, 469 F.3d 57, 62 (2d Cir. 2006).

Courts differ about substitution of statutorily appointed counsel in capital federal habeas cases. But all of their decisions are at least bottomed on Sixth Amendment analysis. Compare *Bonin* v. *Vasquez*, 999 F.2d at 431 (denying motions of counsel appointed under §3006A to withdraw since petitioners did not have constitutional right to ineffective assistance of counsel on habeas) with *Johnson* v. *Gibson*, 169 F.3d 1239, 1254 (10th Cir. 1999) (§3599 substitution standards implicate same concerns as Sixth Amendment).

Section 3006A was, after all, intended "to insure that [trial] defendants who are financially unable to afford trial services necessary to an adequate defense are provided them in accordance with the Sixth Amendment. . . ." *United States* v. *Barcelon*, 833 F.2d 894, 896 (10th Cir. 1987). Although §3006A provides for counsel in cases in which there is no constitutional right to counsel, it was not intended to provide a right to counsel that exceeds the constitutional rights

granted to criminal defendants. See *United States* v. *Eskridge*, 445 F.3d 930, 933 (7th Cir. 2006); *United States* v. *Berger*, 375 F.3d 1223, 1226 (11th Cir. 2004); *Bonin* v. *Vasquez*, 999 F.2d at 427-431; *Chaney* v. *Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986). Indeed, because appointment of habeas counsel under §3006A is discretionary, its "interests of justice" standard cannot provide greater protection than the protection accorded to defendants who are mandatorily entitled to representation under the Sixth Amendment.

Counterintuitively, the Ninth Circuit actually accorded Clair greater latitude on his substitution motion than is available to criminal defendants seeking to protect their constitutional right to counsel at trial.[6] See *United States* v. *Lane*, 474 U.S. 438, 446

---

[6] The Ninth Circuit stated that Clair was challenging his counsels' "meaningful assistance." "Meaningful assistance" is not a constitutional standard. In *McFarland* v. *Scott*, 512 U.S. 849 (1994), this Court held that stays of execution could be ordered so that appointed counsel under §3599 could "meaningfully . . . research and present a defendant's habeas claims." *Id.* at 858. In short, §3599 gives appointed counsel a realistic opportunity to assemble a petition without facing the deadline of a scheduled execution. *McFarland* never held that §3599 implemented a constitutional right. The Ninth Circuit seized on *McFarland*'s language to hold that "meaningful assistance of counsel" on habeas was essential to protect capital inmates' rights. *Rohan ex rel. Gates* v. *Woodford*, 334 F.3d 803, 813 (9th Cir. 2003). It still acknowledged that there was no constitutional right to effective assistance of habeas counsel. *Id.* at 810. The Ninth Circuit has extended this "meaningful assistance" doctrine to habeas appeals. *In re Gonzales*, 623 F.3d 1242 (9th Cir. 2010), cert. pending *Ryan* v. *Gonzales*, No. 10-930. This is a "transparent attempt to smuggle *Strickland* into a realm the Sixth

(Continued on following page)

n. 9 (1986) (logically, constitutional error subject to more stringent prejudice analysis than non-constitutional error.) Clair's complaint amounted to no more than an allegation that he and his counsel disagreed about a particular line of investigation even though Clair's allegations did not rise to the level of constitutional ineffectiveness. Pet.App. 5 (citing *District Attorney's Office for the Third Judicial District* v. *Osborne*, 129 S.Ct. at 2320, and *Bonin* v. *Vasquez*, 999 F.2d at 429). Clair faults his counsel for failing to follow his "instructions" to investigate physical evidence (Resp.Br. 36 n. 25), but there is no authority granting Clair the right to control his counsel on a tactical matter. *Jones* v. *Barnes*, 463 U.S. 745, 751-754 (1983). Clair concedes that the "ordinary," "proper," and "appropriate" remedy for the district court's alleged failure to inquire about Clair's request would have been to remand his case for that inquiry. Resp.Br. 2, 39. The Ninth Circuit did not order that inquiry. The Ninth Circuit's interpretation and application of §3599 was inconsistent with this Court's habeas corpus jurisprudence which bills criminal trials as the "main event" and with the State's interest in proceeding with its judgments. *McFarland* v. *Scott*, 512 U.S. at 859.

Clair concedes the Ninth Circuit applied a standard to his substitution request that exceeded constitutional norms. Remarkably, he claims this is

---

Amendment does not reach." *Holland* v. *Florida*, ___ U.S. ___, 130 S.Ct. 2549, 2575 (2010) (Scalia, J., dissenting).

"unsurprising" because §3599 provides a statutory right to counsel that exceeds "what the Constitution requires." Resp.Br. 30. No specific language in the statute supports his assertion. See *Harris* v. *Vasquez*, 949 F.2d at 1523. He does not explain why Congress would have granted habeas corpus petitioners greater rights to substitute appointed counsel than those available to presumptively innocent criminal defendants at trial. Nor does he acknowledge this Court's holding in *Pennsylvania* v. *Finley*, 481 U.S. at 559, that conferring a post-conviction statutory right to counsel does not require giving prisoners "the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position – at trial and on first appeal as of right."

The natural reading of §3599, whether or not it contains the "interests of justice" language, *supports* limiting a petitioner's substitution motion to grounds that actually vindicate the specific substantive statutory right to representation by qualified counsel – conflict of interest, abandonment, or failure to meet the statutory qualifications. Congress had good reason not to also create a specific right to effective assistance of appointed counsel. See, *e.g.*, *Bonin* v. *Vasquez*, 999 F.2d at 429-430. Rather, Congress ensured that capital prisoners would be adequately represented by attorneys with greater qualifications, money, resources, and time.

III. UNDER ANY REASONABLE STANDARD, THE NINTH CIRCUIT ERRED IN VACATING THE JUDGMENT DENYING CLAIR'S HABEAS CORPUS PETITION AND IN REMANDING HIS CASE FOR FURTHER PROCEEDINGS ON HIS FIRST PETITION.

In any event, under any reasonable standard, Clair's allegations about the Federal Public Defender did not justify the Ninth Circuit's radical decision to give Clair the chance to undo 17 years of federal court litigation and add new claims to his first petition in lieu of satisfying the statutory restrictions on successive petitions.

Clair concedes that, "in the ordinary case, as the State suggests, the proper course where a district court failed to give adequate consideration to a request for new counsel might well be a remand for the district court to undertake the appropriate inquiry." Resp.Br. 39. But he defends the Ninth Circuit's failure to follow the "proper" course because a new lawyer had already been appointed for him on appeal who had been litigating the case during the intervening five years and because the judge had retired. *Id.* at 39-40. Clair's defense hardly explains the Ninth Circuit's deviation from "ordinary" practice. An inquiry could have been conducted with the judge currently assigned to the case under Rule 63 of the Federal Rules of Civil Procedure. Pet.Br. 47. If Clair's complaints were baseless, the Ninth Circuit could have completed review of the denial of Clair's original

petition. Instead, the court gave Clair a "free pass" to try to reopen his case, as if it had authorized a second petition.

The Ninth Circuit did not explain how Clair's complaints about his counsel would be relevant to any pending matter in his habeas case. According to the opinion below, Clair had located some physical evidence from Linda Rodgers' murder scene. The opinion characterized the evidence as "potentially of great importance" because Clair's conviction was "based on circumstantial evidence and occurred before the advent of DNA testing and other modern forensic techniques." Pet.App. 3-4.

Despite the Ninth Circuit's enthusiasm, it is not apparent how this new evidence could be "incorporated into Clair's habeas petition." Pet.App. 5.[7] Clair speculates this evidence could support either an ineffective assistance of counsel at trial claim or a prosecutorial suppression of material evidence claim. Resp.Br. 41. But Clair cannot show deficiency or prejudice from a failure to pursue testing techniques

---

[7] As Clair candidly admits, the California Supreme Court has now denied a habeas petition based on these claims. Resp.Br. 13. The state court's merits denial of Clair's petition indicates his prior counsel acted reasonably in not choosing to pursue these claims. The Ninth Circuit's disposition, if allowed to stand, potentially allows Clair to raise these claims now without filing a successive petition and without being subject to AEDPA's deferential review standards.

that were not available at the time of his trial. *Lockhart* v. *Fretwell*, 506 U.S. 364, 369-373 (1993).[6]

Furthermore, contrary to Clair's speculation (Resp.Br. 41), this new evidence could not support a valid free-standing claim of actual innocence. Pet.Br. 52-53. Clair's preoccupation with the physical evidence does nothing to neutralize the effect of his incriminating taped conversation with his girlfriend and crime night companion, Pauline Flores. During the conversation about the Rodgers murder, Clair manifested a consciousness of guilt by accusing Flores of being "miked up" and patting her down. His suspicions apparently allayed, Clair made admissions to Flores that tied him to the crime and corroborated her testimony about the night he murdered Linda Rodgers. Pet.App. 53-54; Pet.Cert. 4; Pet.Br. 3-4.[7]

---

[6] The availability of DNA testing now does not support a trial error claim since DNA testing was inadmissible at the time of Clair's 1987 trial. *People* v. *Axell*, 235 Cal.App.3d 836, 1 Cal.Rptr.2d 411 (1991) (DNA evidence first approved in California).

[7] Clair recites a number of irrelevant events that transpired after the district court denied his substitution motion on June 30, 2005. None of this information is properly before this Court. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158, n. 16 (1970). None of the information undercuts the incriminating weight of Clair's own taped admissions. Besides communicating extra-record information to the Court, Clair also has inappropriately submitted sealed documents in this case without revealing their contents to the State. Resp.Br. 11 n. 7. *United States* v. *Nobles*, 422 U.S. 425, 240 & n. 14 (1975). The State has confined its arguments to the opinion below and the record pertinent to the district court's order.

Clair still has not shown how testing the physical evidence from his crime scene would come close to the "extraordinarily strong" showing that is hypothetically necessary for an "actual innocence" claim. See, *e.g.*, *House* v. *Bell*, 547 U.S. 518, 554-555 (2006).

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
BARRY J.T. CARLTON
Supervising Deputy Attorney General
WARD A. CAMPBELL*
Supervising Deputy Attorney General
**Counsel of Record*
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street
P.O. Box 944255
Sacramento, California 94244-2550
(916) 324-5251
ward.campbell@doj.ca.gov
Counsel for Petitioner

Steve Bullock
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1401

Jon Bruning
Attorney General
State of Nebraska
P.O. Box 98920
Lincoln, NE 68509

Catherine Cortez Masto
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

Gary K. King
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

Roy Cooper
Attorney General
State of North Carolina
Dept. of Justice
P.O. Box 629
Raleigh, NC 27602

Michael DeWine
Attorney General
State of Ohio
30 East Broad Street.
17th Floor
Columbus, OH 43215

E. Scott Pruitt
Attorney General
State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105-4894

Linda L. Kelly
Attorney General
State of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

Alan Wilson
Attorney General
State of South Carolina
Post Office Box 11549
Columbia, SC 29211

Marty J. Jackley
Attorney General
State of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

Luther Strange
Attorney General
State of Alabama
501 Washington
Avenue
Montgomery, AL 36130

Tom Horne
Attorney General
State of Arizona
1275 West Washington
Street
Phoenix, AZ 85007

John Suthers
Attorney General
State of Colorado
1525 Sherman Street
Denver, CO 80203

Kevin T. Kane
Chief State's Attorney
State of Connecticut
300 Corporate Place
Rocky Hill, CT 06067

Joseph R. Biden, III
Attorney General
State of Delaware
820 N. French Street
Wilmington, DE 19801

Samuel S. Olens
Attorney General
State of Georgia
40 Capitol Square,
S.W.
Atlanta, GA 30334

Leonardo M. Rapadas
Attorney General
Territory of Guam
287 West O'Brien
Drive
Hagatna, Guam 96910

Lawrence G. Wasden
Attorney General
State of Idaho
Post Office Box 83720
Boise, ID 83720-0010

Jack Conway
Attorney General
State of Kentucky
700 Capitol Avenue,
Suite 118
Frankfort, KY 40601

James D. "Buddy"
Attorney General
State of Louisiana
Louisiana Department
of Justice
P.O. Box 94005
Baton Rouge, LA
70804

AMICUS CURIAE BRIEF

No. 10-1265

In the Supreme Court of the United States

MICHAEL MARTEL,

Petitioner,

v.

KENNETH CLAIR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF FLORIDA, ALABAMA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, GUAM, IDAHO, KENTUCKY, LOUISIANA, MONTANA, NEBRASKA, NEW MEXICO, NEVADA, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON AND WYOMING IN SUPPORT OF THE PETITIONER

PAMELA JO BONDI
Attorney General of Florida
Scott D. Makar*
Solicitor General
Ronald A. Lathan
Courtney Brewer
Deputy Solicitors General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850-414-3300
850-410-2672 fax
Counsel for Amici Curiae
*Counsel of Record

Library of Congress
Law Library

Robert E. Cooper
Attorney General
State of Tennessee
Office of the Attorney
General
425 Fifth Avenue
North
Nashville, TN 37243

Greg Abott
Attorney General
State of Texas
Post Office Box 12548
Austin, TX 78711-2548

Mark L. Shurtleff
Attorney General
State of Utah
Capitol Suite #230
Post Office Box 142320
Salt Lake City, UT
84114-2320

Robert M. McKenna
Attorney General
State of Washington
1125 Washington
Street SE
Post Office Box 40100
Olympia, WA 98504

Gregory A. Phillips
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, WY 82002

QUESTION PRESENTED

At the end of ten years of capital federal habeas corpus proceedings in the district court, respondent suddenly complained about and sought replacement of his court-appointed public defender with a new appointed lawyer. The district court refused, explaining "it appears Petitioner's counsel is doing a proper job" and that "[n]o conflict of interest or inadequacy of counsel is shown." Thereupon it issued its ruling denying habeas corpus relief. On appeal, however, the Ninth Circuit appointed a replacement lawyer, vacated the judgment, and remanded for further proceedings to allow the new lawyer to raise additional claims for relief. The Ninth Circuit explained that no showing of ineffectiveness of counsel was required, for it was enough that Clair had expressed "dissatisfaction" and had alleged that the public defender was failing to pursue potentially important evidence.

The Question Presented is:

Whether a condemned state prisoner in federal habeas corpus proceedings is entitled to replace his court-appointed counsel with another court appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF AMICI INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Denial of a Motion to Substitute Capital Habeas Counsel is Not an Abuse of Discretion When the Petitioner Expresses Some Dissatisfaction with Counsel's Performance 5

A. Sections 3006A(c) and 3599(e) do not give capital postconviction litigants in federal habeas proceedings the unfettered right to change counsel at the eleventh hour. 5

B. The Ninth Circuit's analysis is contrary to the basic norms of federalism, will render AEDPA's established statutory guidelines and legislative intent a nullity, and is administratively unworkable. 14

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Abuelhawa v. United States,
129 S. Ct. 2102 (2009) 22

Blair v. Cullen,
No. CV 99-6859-VAP, 2010 WL 5563896
(C.D. Cal. Mar. 31, 2010) 14

Brown v. Duchesne,
19 How. 183 (1857) 21

Burns v. United States,
501 U.S. 129 (1991) 10

Burris v. Parke,
95 F.3d 465 (7th Cir. 1996) 13

Calderon v. Thompson,
523 U.S. 538 (1998) 14

Clair v. Ayers,
403 Fed. Appx. 276 (9th Cir. 2010) 10, 21

Coleman v. Thompson,
501 U.S. 722 (1991) 20

Furman v. Georgia,
408 U.S. 238 (1972) 11

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982) 23

Harbison v. Bell,
129 S. Ct. 1481 (2009).....11, 22

Harrington v. Richter,
131 S. Ct. 770 (2011).....15

Herrera v. Collins,
506 U.S. 390 (1993).....15

Hill v. McDonough,
547 U.S. 573 (2006).....15

Hunter v. Delo,
62 F.3d 271 (8th Cir. 1995).....9

Keene Corp. v. United States,
508 U.S. 200 (1993).....7

Lockyer v. Andrade,
538 U.S. 63 (2003).....20

Marshall v. Lonberger,
459 U.S. 422 (1983).....20

McCleskey v. Zant,
499 U.S. 467 (1991).....15, 17

McFarland v. Scott,
512 U.S. 849 (1994).....8

McKinney v. Paskett,
753 F. Supp. 861 (D. Idaho 1990).....7

Morris v. Slappy,
463 U.S. 1 (1983).....17

Murray v. Giarratano,
492 U.S. 1 (1989).....9

Nelson v. Campbell,
541 U.S. 637 (2004).....16

Northcross v. Bd. of Educ.,
412 U.S. 427 (1973).....7

Ratzlaf v. United States,
510 U.S. 135 (1994).....10

Renico v. Lett,
130 S. Ct. 1855 (2010).....20

Rohan ex rel. Gates v. Woodford,
334 F.3d 803 (9th Cir. 2003).....13

Russello v. United States,
464 U.S. 16 (1983).....8

Schneckloth v. Bustamonte,
412 U.S. 218 (1973).....18

Stafford v. Briggs,
444 U.S. 527 (1984).....21

Sterling v. Scott,
57 F.3d 451 (5th Cir. 1995).....11

United States v. Addonizio,
442 U.S. 178 (1979).....18

United States v. Corona-Garcia,
210 F.3d 973 (9th Cir. 2002).....8

United States v. Davis,
354 Fed. Appx. 897 (5th Cir. 2009).....9

United States v. Ghailani,
686 F. Supp. 2d 279 (S.D.N.Y. 2009).....9

United States v. Herrera,
No. CR 08-0739 WHA, 2010 WL 5060608
(N.D. Cal. 2010).....9

United States v. Moore,
706 F.2d 538 (5th Cir. 1983).....8

United States v. Nelson,
No. CR 09-105S, 2010 WL 2574029
(D.R.I. June 22, 2010).....9

United States v. White,
451 F.2d 1225 (6th Cir. 1971).....9

Van Adams v. Schriro,
No. CV-04-1359-PHX-MHM, 2009 WL 89465
(D. Ariz. Jan. 14, 2009).....14

Williams v. Taylor,
529 U.S. 420 (2000).....15, 19

Woodford v. Garceau,
538 U.S. 202 (2003).....19

Statutes

18 U.S.C. § 3006A ..... *passim*

18 U.S.C. § 3006A(c) ..... *passim*

18 U.S.C. § 3006A(e)(1) 6

18 U.S.C. § 3599 ..... *passim*

18 U.S.C. § 3599(a)(2) 11

18 U.S.C. § 3599(e) ..... *passim*

21 U.S.C. § 848(q) 10, 11

21 U.S.C. § 848(q)(8) 6

21 U.S.C. § 848(q)(9) 6, 7

28 U.S.C. § 2244 19

28 U.S.C. § 2254 22

28 U.S.C. § 2254(i) 22

Miscellaneous

134 Cong. Rec. (1988) 11, 12

142 Cong. Rec. (1996) 19

Bureau of Justice Statistics, Key Facts at a Glance, Prisoners on Death Row by Race, Number of Prisoners Under Sentence of Death, 1968-2009, *available at* http://bjs.ojp.usdoj.gov/content/glance/tables/drracetab.cfm 16

Conf. Rep. No. 1709, *reprinted in* 1964 U.S. Code Cong. & Adm. News 2990 12

John F. Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. Cin. L. Rev. 574 (1982) 12

Fla. Dep't of Corrs., Corrections Offender Network, Death Row Roster, *available at* http://www.dc.state.fl.us/activeinmates/deathrowroster.asp 16

H.R. Rep. No. 864, *reprinted in* 1964 U.S. Code Cong. & Adm. News 2990 12

STATEMENT OF AMICI INTEREST

At issue are 18 U.S.C. § 3599 and 18 U.S.C. § 3006A, which provide funding to attorneys representing capital and noncapital defendants respectively. The plain language and legislative histories of both statutes demonstrate that neither was intended to regulate the substance or efficacy of a federally appointed habeas counsel's representation. The Amici States, which engage in substantial federal habeas litigation, would be adversely affected by an interpretation of these statutes that gives capital habeas petitioners an unfettered right to substitute federally appointed counsel at the eleventh hour—and thereby gain the ability to relitigate a previously denied habeas petition. The Ninth Circuit relied on these statutes to find that the district court abused its discretion when it denied a petitioner's motion to substitute his appointed habeas counsel because the petitioner was dissatisfied with his counsel's performance. The Ninth Circuit's interpretation of these statutes invites delay and encourages gamesmanship by petitioners facing capital sentences, who have every incentive to postpone the proceedings for as long as possible.

The Amici States are concerned because the Ninth Circuit's decision does not offer any constraining principles that reduce the potential for abusive tactics by habeas petitioners. The court comes very close to suggesting that federal habeas petitioners have a *per se* statutory right to change counsel, irrespective of the grounds or merit of the substitution motion. The Amici States urge this

Court to reject such an interpretation of what are, in essence, two funding statutes that do not establish a basis for relief the Ninth Circuit imposed.

SUMMARY OF ARGUMENT

Under 18 U.S.C. § 3599, a state capital defendant has a statutory right to appointed counsel to pursue federal habeas relief. Section 3599(e) further provides that "[u]nless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant," a federally appointed attorney "shall represent the defendant throughout every subsequent stage of available judicial proceedings ... ." 18 U.S.C. § 3599(e).

In determining when a habeas petitioner's motion to substitute appointed counsel should be granted, the Ninth Circuit looked to 18 U.S.C. § 3006A(c) for an answer. Section 3006A, however, only provides funding to attorneys representing indigent *non-capital* defendants under certain circumstances, including those seeking federal habeas relief, and provides that a court "may, in the interests of justice, substitute one appointed counsel for another at any stage of proceedings." The Ninth Circuit erroneously concluded that section 3006A(c)'s "in the interests of justice" language governed habeas counsel substitutions under section 3599. The Ninth Circuit conceded that no express textual support exists for its holding, yet concluded that capital habeas petitioners always have the right to substitute counsel—"in the interests of justice"—whenever the petitioner expresses dissatisfaction with his appointed counsel's performance. Thus, according to the Ninth Circuit, the interests of justice dictate not only a new attorney, but also multiple opportunities to revisit a previously denied federal habeas petition.

The legislative histories of sections 3599 and 3006A provide no basis for concluding that Congress intended them to be read in the manner employed by the Ninth Circuit. Congress could have easily stated that section 3006A(c)'s "interest of justice standard" applies when a habeas petitioner is represented by an attorney appointed under section 3599. But it did not. Moreover, the Ninth Circuit's standard for substitution of counsel is more permissive than would be available to even a criminal defendant. Simple dissatisfaction with trial counsel's performance is not sufficient grounds to entitle a defendant to a new attorney, and it should not be the standard governing a petitioner's request for new counsel in the federal habeas context.

Finally, the Ninth Circuit's decision failed to accord deference to California's state court judgments. Federal courts have never been a forum to relitigate state criminal trials. Federalism requires that federal courts respect state convictions even when they do not agree with them. Federal courts may not grant multiple opportunities to seek habeas relief on statutory grounds never contemplated by Congress. Yet the standard articulated by the Ninth Circuit will render any statutory constraints on the writ ineffectual.

ARGUMENT

I. The Denial of a Motion to Substitute Capital Habeas Counsel is Not an Abuse of Discretion When the Petitioner Expresses Some Dissatisfaction with Counsel's Performance.

A. Sections 3599(e) and 3006A(c) do not give capital postconviction litigants in federal habeas proceedings the unfettered right to change counsel at the eleventh hour.

1. The Ninth Circuit strayed from the intended meanings of sections 3599(e) and 3006A(c) in holding that the district court abused its discretion by failing to permit substitution of counsel below. Section 3599 simply regulates funding for appointed counsel to *capital* defendants in federal habeas proceedings. In contrast, section 3006A(c) provides appointed counsel to *noncapital* defendants in certain circumstances and states that a court may permit substitution of counsel "in the interests of justice." No basis exists for engrafting the latter onto the former. In doing so, the Ninth Circuit has created a permissive substitution of counsel standard in the habeas context without textual support. This new standard now provides petitioners, represented by attorneys appointed under section 3599, an opportunity to obtain new habeas proceedings by merely demonstrating that they are dissatisfied with their appointed habeas attorneys' performance. The Ninth Circuit's holding imposes a standard more

permissive than would be available to a defendant proceeding in a criminal trial.

Section 3599(e) provides that a capital defendant seeking federal habeas relief may request substitution of counsel, but it does not set forth a standard for granting a substitution motion. Instead, the statute simply provides: "Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings ... ." 18 U.S.C. § 3599(e) (originally codified at 21 U.S.C. § 848(q)(8)).

When Congress enacted section 3599(e) it could have easily adopted or referenced the "interests of justice" standard contained in section 3006A(c).[1] But it did not. Indeed, Congress used similar language regarding the availability of "investigative" services in both sections 3599 and 3006A. *Compare* 21 U.S.C. § 848(q)(9) (1995) ("Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore ... ."), *with* 18 U.S.C. § 3006A(e)(1) ("Upon

---

[1] Section 3006A(c) was enacted as part of the Criminal Justice Act of 1964. This Act principally ensures that indigent federal defendants have the effective assistance of counsel and other resources at trial and through appeal.

finding, after appropriate inquiry in an ex parte proceeding, that the [investigative, expert or other services] are necessary and that the person is financially unable to obtain them, the court ... shall authorize counsel to obtain the services."). But Congress did not employ parallel language regarding the standard for replacement of counsel, and section 3006A(c)'s reference to the "interests of justice" has no bearing on motions for substitution of counsel under section 3599(e).

Where similar language is used in related statutes, a court legitimately can accord similar interpretations to the separate provisions. *See Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam) ("The similarity of language in [the two statutes] is, of course, a strong indication that the two statutes should be interpreted" similar to one another.); *see also McKinney v. Paskett*, 753 F. Supp. 861, 863 (D. Idaho 1990) ("Comparing this section of the Criminal Justice Act to the very similar language regarding 'experts and investigators' in subsection 848(q)(9), it is clear that subsection 848(q)(9) was drafted to provide the same protection to the defense of federal defendants accused of drug crimes.").

Here, however, the plain language of section 3006A(c) does not parallel that of section 3599(e). It is thus doubtful that Congress intended for the provisions to have the same meaning. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("where Congress includes particular language in one section of a statute but omits it in another ... , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

(quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). The Ninth Circuit's interpretation of section 3599(e) transforms a statute responsible for "grant[ing] indigent capital defendants the right to qualified legal counsel," *McFarland v. Scott*, 512 U.S. 849, 854 (1994), into a provision regulating the substance of attorney-client relations in federal habeas proceedings. Reviewing courts should not be permitted to fashion new legal standards by synthesizing isolated clauses from unrelated statutory provisions.

Not only did the Ninth Circuit engraft a new standard to apply to motions for substitution of counsel under section 3599(e), it did so by applying the "interests of justice" language without regard to any principled boundary. The unfortunate result is that whenever a dispute arises between a habeas petitioner and a section 3599 appointed attorney, the "interests of justice" compel substitution of counsel even if the State faces the prospect of relitigating the entirety of the petitioner's federal habeas claims.

Even when Sixth Amendment considerations are implicated, courts require that a defendant show more than mere disagreement or dissatisfaction with counsel's decisions. *See United States v. Corona-Garcia*, 210 F.3d 973, 977 n.2 (9th Cir. 2000) ("Even if we were to conclude that the conflict with respect to trial tactics was severe, however, we would still be disinclined to reverse on that ground because trial tactics are clearly within the realm of powers committed to the discretion of defense counsel in any event.") (citation omitted); *United States v. Moore*, 706 F.2d 538, 540 (5th Cir. 1983) ("A defendant is not

entitled to an attorney who agrees with the defendant's personal view of the prevailing law or the equities of the prosecutor's case. A defendant is entitled to an attorney who will consider the defendant's views and seek to accommodate all reasonable requests with respect to trial preparation and trial tactics."); *see also Hunter v. Delo*, 62 F.3d 271, 274 (8th Cir. 1995) ("the standards for granting substitute counsel are strict").

Courts considering substitution of counsel requests under section 3006A, for example, have considered a host of factors, such as the timing of the motion, *United States v. White*, 451 F.2d 1225, 1226 (6th Cir. 1971), the costs or suitability of a particular attorney, *United States v. Herrera*, No. CR 08-0739 WHA, 2010 WL 5060608, at *3 (N.D. Cal. 2010), and the nature and stage of the current proceedings, *United States v. Nelson*, No. CR 09-105S, 2010 WL 2574029, at *2 (D.R.I. June 22, 2010). Mere differences with counsel regarding the claims raised do not suffice. *United States v. Davis*, 354 Fed. Appx. 897, 899 (5th Cir. 2009); *see also United States v. Ghailani*, 686 F. Supp. 2d 279, 299 (S.D.N.Y. 2009) (noting that this Court has interpreted "the Sixth Amendment as fundamentally more concerned with fostering an effective adversarial system than with ensuring satisfying attorney-client relationships").

It is well understood that there is no constitutional right to postconviction counsel. *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 7-15 (1989). As noted, section 3599 is simply a statute that provides federal habeas counsel to capital defendants. It does not provide habeas petitioners a

legal basis to challenge the quality or efficacy of post-conviction counsel's performance. Section 3599(e) does not dictate that a petitioner must be provided with new habeas counsel whenever the petitioner expresses some modicum of dissatisfaction with his federally-appointed habeas counsel. Yet the Ninth Circuit's non-textual reading of section 3599 ignores the express language of the statute, erroneously concluding that it regulates matters beyond simply providing an attorney, for circumscribed and limited purposes, to an indigent capital defendant.

2. Even considering legislative history, which this Court avoids when language is as plain as that in section 3599, *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"), the Ninth Circuit was without a basis to conclude that "Congress must have intended to provide [capital habeas] petitioners with at least as much opportunity to replace counsel with whom they are dissatisfied as it provides noncapital habeas petitioners ... ." *Clair v. Ayers*, 403 Fed. Appx. 276, 278 (9th Cir. 2010). The court cited no support for this statement and, indeed, nothing in the background or context of any of the statutes at issue supports the Ninth Circuit's statement. *See Burns v. United States*, 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.").

Enacted as part of the Anti-Drug Abuse Act of 1988, and originally codified at 21 U.S.C. § 848(q),

section 3599 was part of the first federal death penalty provision enacted since this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). The Act made drug-related homicide a federal capital offense. *Harbison v. Bell*, 129 S. Ct. 1481, 1489 (2009). But the legislative history as to the counsel provisions is "regrettably thin." *Id.* No Senate or House reports explain the meaning behind these provisions. *Sterling v. Scott*, 57 F.3d 451,456 (5th Cir. 1995) ("No House or Senate reports or other expression of legislative intent in drafting this provision [§ 848(q)] were submitted with this legislation.").

Most of the debate in Congress surrounded the propriety of federal imposition of the death penalty, with little attention given to the statutory counsel right that was created. *See, e.g.*, 134 Cong. Rec. 22,975-22,995 (1988). The provisions relating to the qualifications and substitution of counsel, originally proposed by Representative John Conyers, were added without significant debate in the legislative record. Representative Conyers's comments emphasized the importance of experienced counsel in capital punishment cases. 134 Cong. Rec. 22,996 ("What we propose is a requirement that the lawyers in these cases have sufficient experience that will enable them to handle these very difficult cases."). Notably, Representative George Gekas, who proposed provisions similar to those enacted in section 3599(a)(2), *see Harbison*, 129 S. Ct. at 1489, stated that he did not wish the Conyers amendment "to be viewed by ... anybody ... or utilized as a dilatory tactic or in any way to thwart the final will of the jury which has imposed the death penalty, but rather to accord the defendant all the rights to which

I feel are already his and to expand them to the extent that the qualifications of the counsel shall be without question." 134 Cong. Rec. 22,997. The Senate's consideration of similar provisions also lacked significant discussion of the issues here. *Id.* at 30,745-46. The legislative history of section 3599 therefore does not support the holding below, given that Congress never expressed that motions for substitution of counsel should be governed by the lax standard espoused by the Ninth Circuit.

In adopting section 3006A, Congress focused nearly exclusively on federal criminal defendants at trial. The statute's purpose was "to diminish the role poverty plays in securing to a criminal defendant a fair trial, an experienced lawyer, a trained investigator or a technical expert." John F. Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. Cin. L. Rev. 574, 600 (1982). The legislative history available shows that much of the concern leading to the enactment of section 3006A(c) focused on when counsel was initially appointed, not the substitution provision. The documents associated with the legislation reveal that lawmakers wanted to ensure representation began pre-trial. H.R. Rep. No. 864, *reprinted in* 1964 U.S. Code Cong. & Adm. News 2990, 2995 (letter from Attorney General) (the statute "insures that the advice of counsel will be available at the critical early stages when recollections are fresh and the opportunity to uncover evidence is greatest."). Much of the debate over the provisions of section 3006A concerned how counsel should be provided, *id.* Conf. Rep. No. 1709, at 3001, and whether investigative services should

be provided to the accused, *id.* at 3002. Little can be gleaned from the legislative history as to what the counsel substitution provisions meant. Therefore, to the extent the legislative histories of sections 3599(e) and 3006A(c) are relevant, they do not support the extraordinary relief Clair obtained here. None of the history addresses the issue presented and thereby provides no support for the Ninth Circuit's interpretation.

3. The Ninth Circuit creates a right to substitute counsel that exceeds even that which is given to criminal defendants at trial, who are constitutionally entitled to counsel. Section 3599 should not be applied in ways neither expressed by the plain language nor intended by the drafters. Such holdings, if left unchecked, will only further delay the federal review of state capital sentences. *See generally Burris v. Parke*, 95 F.3d 465, 471 n.1 (7th Cir. 1996) (Manion, J., concurring) ("Delay is the name of the game in death penalty cases.").

The Ninth Circuit's decision works mischief in other ways. For example, the Ninth Circuit has asserted that the statutory right to counsel in section 3599 implies a right to competence in federal postconviction proceedings. *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 813 (9th Cir. 2003) ("And if meaningful assistance of counsel is essential to the fair administration of the death penalty and capacity for rational communication is essential to meaningful assistance of counsel, it follows that Congress's mandate cannot be faithfully enforced unless courts ensure that a petitioner is competent."). The ruling has resulted in tangential

litigation regarding competence and has resulted in protracted stays. *See, e.g.*, *Blair v. Cullen*, No. CV 99-6859-VAP, 2010 WL 5563896 (C.D. Cal. Mar. 31, 2010); *Van Adams v. Schriro*, No. CV-04-1359-PHX-MHM, 2009 WL 89465 (D. Ariz. Jan. 14, 2009).

The Ninth Circuit's holding imposes a standard more permissive than would normally be available to a defendant proceeding in a criminal trial. The court's non-textual reading of section 3599 undermines the statute's plain meaning—reading rights into it that do not exist. And the court does not give any countervailing weight to the interests that States have in the administration of justice. Section 3599 should not be used to further hamper the States' interest in the finality of their judgments and Congress's intent to eliminate unnecessary delay in capital matters.

B. The Ninth Circuit's analysis is contrary to the basic norms of federalism, will render AEDPA's established statutory guidelines and legislative intent a nullity, and is administratively unworkable.

1. The principles of federalism, particularly the concepts of finality and comity, are implicated when federal courts review state criminal convictions. *See, e.g.*, *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) (citations omitted) ("Finality serves as well to preserve the federal balance. Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional

rights.") (citation and quotation marks omitted). Fundamentally, States must be afforded the opportunity to effectuate criminal sentences without undue involvement from federal courts. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them."); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006) ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.").

A state criminal conviction that did not violate the defendant's federal constitutional rights binds a federal court's review of that judgment. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 416 (1993). A core precept of federalism is that federal courts must accord due respect to the States' criminal justice systems. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000) ("[W]e have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings."). At a minimum, federal courts must resist the temptation to relitigate state criminal convictions—even when the result under challenge does not accord with a federal court's view of the appropriate outcome. *See, e.g., Harrington v. Richter*, 131 S. Ct. 770, 780 (2011) (reversing a Ninth Circuit issuance of a writ, noting that "[judicial] resources are diminished and misspent ... and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance").

The underlying matter is neither abstract nor academic for the States. A "State retains a significant interest in meting out a sentence of death in a timely fashion." *Nelson v. Campbell*, 541 U.S. 637, 644 (2004). The State of Florida presently has approximately 400 individuals on death row.[2] There are more than 3,000 capital defendants nationwide.[3] The majority of these defendants lack the monetary resources to retain private counsel to assist with postconviction legal processes. As such, section 3599(e) provides valuable financial support to federally appointed attorneys representing individuals in postconviction matters.

Section 3599(e), however, was not intended to be a vehicle to impede the functioning of state criminal justice systems. California's experience is instructive. In 2005, Clair's federal habeas claims were denied following a decade of ancillary federal court litigation. The substitution motion was filed two weeks before the district court denied his federal habeas claims. The Ninth Circuit nevertheless found, some twenty-five years after the murder of Linda

---

[2] According to the Florida Department of Corrections, 397 individuals are on death row. *See* Fla. Dep't of Corrs., Corrections Offender Network, Death Row Roster, *available at* http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (last visited August 31, 2011).

[3] According to the Bureau of Justice, as of 2009, 3,173 individuals were serving capital sentences nationwide. *See* Bureau of Justice Statistics, Key Facts at a Glance, Prisoners on Death Row by Race, Number of Prisoners Under Sentence of Death, 1968-2009, *available at* http://bjs.ojp.usdoj.gov/content/glance/tables/drracetab.cfm (last visited August 31, 2011).

Rodgers, that the district court abused its discretion when it denied Clair's motion to substitute counsel.

The Ninth Circuit's remedy was to grant Clair new habeas counsel, and to grant new counsel the right to bring whatever new claims counsel saw fit to bring, or to revisit any existing claims in light of whatever new evidence counsel might produce. The result is that California must again litigate Clair's federal constitutional claims. And even if California once again proved its case, nothing would prevent Clair from complaining about his new counsel, and nothing would prevent the Ninth Circuit from replacing Clair's new counsel with still newer counsel, who would necessarily have the right to bring additional claims and evidence as he or she saw fit.

The specter of an endless cycle of repetitive litigation is not fanciful, but real and likely, and it is highly prejudicial to the States. *Cf. Morris v. Slappy*, 463 U.S. 1, 14 (1983) ("The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources."). Not only must California prepare for the prospect of yet another round of habeas proceedings, it must potentially ready itself for newly developed claims that were never presented or considered in the first instance by California's state courts. *See McCleskey*, 499 U.S. at 491-92 (observing that "if reexamination of convictions in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or

subsequent habeas proceeding on grounds not even raised in the first petition.").

The prospect of the Ninth Circuit's commingling of sections 3006A(c) and 3599(e) becoming controlling legal authority deeply concerns the States, especially those with indigent capital defendants. Its decision portends troubling consequences for the effective functioning of state criminal justice systems. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 263 (1973) (Powell, J. concurring) ("To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems."). Simply put, under the Ninth Circuit's analysis, States will never be assured that federal habeas claims have been completely resolved. *See United States v. Addonizio*, 442 U.S. 178, 184 n.11 (1979) (observing that the "increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice").

Federalism becomes empty formalism, in the federal habeas context, if States cannot be assured that their criminal convictions will be respected and subject only to limited federal habeas review. Federal habeas proceedings are not criminal trials and the constitutional protections that might be warranted in the context of a criminal trial should not be similarly available in the post-conviction context. The Ninth Circuit takes the opposite view, and its interpretation of sections 3006A and 3599(e)

is inconsistent with the most basic principles of federalism and comity.

2. If affirmed, the Ninth Circuit's decision will have a concrete impact on all habeas petitioners subject to AEDPA's strictures. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citation omitted). AEDPA implicates matters of comity, finality, and federalism, *see Williams*, 529 U.S. at 436, and provides a state defendant with a one-year statutory time limit to file a petition for writ of habeas corpus, 28 U.S.C. § 2244.

AEDPA's legislative history reveals that Congress sought to put an end to piecemeal and repetitive litigation in capital cases. The Conference Report bears this out, stating: "This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." 142 Cong. Rec. H3305 (daily ed. April 15, 1996) (Conference Report on S. 735). Similarly, one of AEDPA's principal architects, Senator Orrin Hatch, indicated that the statute was intended to hasten federal habeas proceedings. Senator Hatch observed that AEDPA "simply ends the improper review of State court decisions. After all, State courts are required to uphold the Constitution and to faithfully apply Federal laws. There is simply no reason that Federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts." 142 Cong. Rec. S3446-02, 3447 (1996).

The Ninth Circuit's ruling provides habeas petitioners with a mechanism to circumvent AEDPA's strict statutory time limits. In Clair's case, his disagreement with his federally appointed attorney entitled him not only to a new attorney, but also to an entirely new federal habeas proceeding. The Ninth Circuit's rule invites successive and repetitive litigation on ancillary matters, and encourages *de novo* review of state criminal proceedings, which, of course, is impermissible under AEDPA. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

AEDPA accords strong deference to state court rulings and decisions. *See Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010). And though not an AEDPA case, the Ninth Circuit's determination in the underlying matter demonstrates that it did not accord any respect or deference to Clair's state proceedings. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 726 (1991) ("This is a case about federalism. It concerns the respect that federal courts owe the States ... when reviewing the claims of state prisoners in federal habeas corpus."); *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983) ("deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations ... it must conclude that the state court's findings lacked even 'fair[ ] support' in the record").

More troubling is the absence of identifiable constraining principles that would prevent reviewing courts from undermining state court judgments in circumstances similar to those presented here. The

Ninth Circuit does not suggest a limiting principle. It implies a petitioner's discontentment with his appointed habeas counsel is sufficient to overturn a federal court's denial of a writ for habeas corpus. Federal courts should not have the unfettered capacity to determine that whenever a federal habeas petitioner moves to substitute habeas counsel, the petitioner not only must be granted the right to file a new habeas petition, but also the right to develop additional federal claims that were never considered by state courts in the first instance. Given the foregoing principles, it is doubtful Congress intended to provide habeas petitioners with a variety of non-textual legal mechanisms to lengthen delays in federal habeas proceedings.

3. Finally, the Ninth Circuit's holding, if accepted, raises serious concerns regarding its administrative workability. The Ninth Circuit observed "Section 3599 provides that counsel may be changed upon a defendant's motion, but does not provide a standard under which such a motion should be adjudicated." *Clair*, 403 Fed. Appx. at 277. But the absence of express textual direction from Congress does not confer upon federal courts the right to disregard the entirety of the statutory text at issue.[4] Federal courts should not interpret statutory clauses in isolation, and the words contained within a statute should not be extended to their greatest

---

[4] *See Stafford v. Briggs*, 444 U.S. 527, 535 (1984) ("And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute ... and the objects and policy of the law ... ." (quoting *Brown v. Duchesne*, 19 How. 183. 194 (1857)).

"definitional possibilities." *Abuelhawa v. United States*, 129 S. Ct. 2102, 2105 (2009).

This Court's recent holding in *Harbison v. Bell*, 129 S. Ct. 1481 (2009), sheds light on the administrative unworkability of the Ninth Circuit's decision here. In *Harbison*, this Court held that the plain language of section 3599(e) permitted a federally-appointed attorney to represent an indigent capital defendant in state clemency proceedings. Consistent with *Harbison*, Clair is entitled to federally-appointed counsel, not only for his federal habeas proceeding (and appeal), but also for any: (1) stays of execution, (2) competency proceedings, and (3) motions for executive clemency.

But consider that under the Ninth Circuit's interpretation of section 3599(e), a reviewing court would be required, "in the interests of justice," to grant a motion to substitute counsel if Clair (or a similarly situated capital defendant) expressed dissatisfaction with his appointed counsel's work-product regarding the substance of a federal habeas petition, a certificate of appealability, a federal appellate brief, a motion for stay of execution, or an appeal for executive clemency. The permutations of this interpretation are alarming for those States that have section 3599 appointed attorneys litigating matters in their state and federal courts. *Cf.* 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). Courts could become inundated with "Clair" motions, piecemeal litigation would increase

exponentially, and States would find it more difficult to achieve finality. This result is not what Congress intended when it provided funding for federal habeas counsel representing capital defendants. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

Accordingly, the Ninth Circuit's analysis of section 3599(e) is not only contrary to the statute's plain meaning, but also is administratively unworkable. The Amici States urge that the Ninth Circuit's reading of section 3599(e) be rejected.

CONCLUSION

For all of the above reasons, this Court should reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

PAMELA JO BONDI
Attorney General of Florida
Scott D. Makar*
Solicitor General of Florida
Ronald A. Lathan
Courtney Brewer
Deputy Solicitors General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850-414-3300
850-410-2672 fax
Counsel for Amici Curiae
*Counsel of Record

September 16, 2011